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AMERICAN JURIST

AND

LAW MAGAZINE

FROM APRIL 1838 TO JANUARY 1843.

AMERICAN JURIST

AND

LAW MAGAZINE

FROM APRIL 1838 TO JANUARY 1843:

DURING WHICH PERIOD IT WAS CONDUCTED AND PRINCIPALLY EDITED

By LUTHER S. CUSHING.

IN TEN VOLUMES.

VOL. I.

Containing Numbers 37 and 38, for April and July 1838, and being
Volume XIX. of the entire Collection.

BOSTON:
CHARLES C. LITTLE AND JAMES BROWN.

MDCCCXLIII.

BOSTON:
PRINTED BY FREEMAN AND BOLLES,
WASHINGTON STREET.

PUBLISHERS' ADVERTISEMENT.

THE publication of the *American Jurist and Law Magazine* was commenced at Boston, in the month of January, 1829, and has since been regularly continued, at the rate of two volumes or four numbers a year, until the beginning of the year 1843, when it was brought to a close with the twenty-eighth volume. During this period, the work has been under the direction of several different editors, and has met with various success, but has never been a source of profit to its proprietors, or of reasonable compensation to its editors and contributors. In the spring of the year 1838, the present publishers undertook to carry on the work, under the editorial supervision of Messrs. CHARLES SUMNER, LUTHER S. CUSHING, and GEORGE S. HILLARD, three gentlemen of the bar in Boston, who had then been for some time employed as its editors; and, for the purpose of giving the work a fresh impulse, the April number for that year was printed with a new type, and issued in a new and improved style of typography. The several subjects, also, which had usually formed the matter of the work, were

arranged in a more definite and systematic order. This number was commenced with an article, "on the plan and objects of the American Jurist and Law Magazine," in which the plan of the work, as it was then established, was set forth and explained at length, and the members of the legal profession were earnestly requested to come forward and assist in its support, both with their subscriptions and their writings. With the April number, therefore, for the year 1838, a new series of the work was in fact commenced, though it did not receive that name, and was considered in no other light than as a continuation of the original publication.

The publishers flattered themselves, that these attempts, on their part, to improve the character and appearance of the work, and to increase its utility and value to the profession, would be followed by a corresponding increase of public favor and patronage. But in this they have been disappointed ; they have scarcely been able, with all the exertions they have made, to make the proceeds of the work defray its expenses, without affording them any profit, or their editors and contributors any adequate compensation. In this way they have gone on, hoping for better success and encouragement, for five years ; during which time, they have published ten volumes of the work, in the new style and on the improved plan, to which allusion has been made. They believe they have thus made a fair (certainly not a hasty) trial of the experiment of a quarterly law periodical, and have satisfied themselves that the profession do not want, and consequently will not adequately support such a work. Having come to this conclusion, upon what seem to them to be good and sufficient grounds, they have taken the only wise course, and have accordingly brought the work to a close.

With the April number for 1838, as already mentioned, the publishers commenced the work upon a new plan and in an improved form ; at the same time, also, they enlarged the number of copies beyond what had been previously printed. The sale of the work, however, did not materially increase, and has since continued nearly the same as before ; and the consequence is, that they have on hand a considerable number of complete sets of the last ten volumes. In order to dispose of these surplus copies, the publishers have given them the form of a new series, by furnishing them with new titlepages, and newly numbering the volumes from one to ten instead of nineteen to twenty-eight. They have given this collection the title of the "American Jurist and Law Magazine, from April 1838, to January 1843, inclusive ; during which period it was conducted and chiefly edited by LUTHER S. CUSHING."

These ten volumes of the American Jurist, being the only ones which can now be obtained in a complete and consecutive form, — constituting of themselves as entire and distinct a work as any periodical can do ; — and, moreover, containing many valuable original articles (particularly the entire series on contracts by Theron Metcalf, Esquire,) and digests of all the recent English and American reports ; — the publishers cannot but indulge the hope, that, at the very low rate at which they offer the work, they may be able speedily to dispose of the remaining copies, and bring the concern to a close without much delay.

The principal charge of the work, for the five years in which these volumes were published, having been in the hands of Mr. L. S. CUSHING, in conjunction first with Messrs. SUMNER and HILLARD,

then for some time alone, and afterwards with Mr. S. F. DIXON, of New York, the publishers have thought it due to the first-named gentleman (and not unjust to the others,) to place his name alone on the titlepage, in the manner already mentioned.

In conclusion, the publishers will take the liberty to remark, that they do not attribute their want of success, in the publication of this work, to any deficiency of ability, learning; or industry, on the part of its editors and contributors, or to any failure, on their own part, in any of the particulars, which fall within the province of publishers; but rather to the limited demand there is, in this country, for a quarterly law periodical of the character of the *American Jurist*. It is but right, also, to add, that the difficulty in the way of supporting the work, resulting from the limited demand for it, has been very much aggravated by the impossibility of obtaining payment from subscribers in remote parts of the country, without great delay and expense.

CHARLES C. LITTLE.

JAMES BROWN.

Boston, July 1, 1843.

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AMERICAN JURIST.

NO. XXXVII.

APRIL, 1838.

ART. I.—ON THE PLAN AND OBJECTS OF THE AMERICAN JURIST AND LAW MAGAZINE.

THE present number commences the *nineteenth* volume, and the *tenth* year of the publication, of the AMERICAN JURIST AND LAW MAGAZINE. Since the commencement of this journal, in January, 1829, several law periodicals have been started in this country, with more or less of encouragement, but with not enough to sustain them for any considerable period. The American Jurist has been received with a degree of public favor, which has been constantly though gradually increasing, and has encouraged the editors to continue its publication to the present time; in conducting it thus far, they have gratuitously contributed much of their own labor and attention, and have also received the aid of many of their professional brethren, by whom they have been furnished with valuable articles for publication; and, to all, therefore, whether contributors or subscribers, who have supported them in their exertions to publish an American Law Periodical, the Editors of the Jurist hereby acknowledge the obligations of the science, to which their journal is devoted.

Whilst thus acknowledging the past coöperation and encouragement, which have made the *American Jurist* what it is, the Editors take occasion to remind their readers, that its future progress and improvement must depend in like manner, upon the ability and spirit of those who contribute to its pages,—upon the care and attention of its editors,—and upon the support which it receives from the public and the profession.

Renewed exertions on the part of correspondents will stimulate the Editors to greater diligence and activity on theirs; and the more editorial attention there is paid to the work, the more worthy will it become of the contributions of learning and genius: the result of both cannot fail to be a wider circulation; and, an enlarged subscription list, besides the gratifying evidence it affords of public approbation, furnishes substantial inducements, of at least equal weight, to still greater exertions and yet more untiring diligence.

When this journal was first undertaken, no periodical of the same kind was then in existence in this country; the *Law Magazine* had been but recently established in England; and the law journals of the continent of Europe were very little if at all known on this side of the Atlantic. The projectors of the *American Jurist*, therefore, while they could derive no aid from experience, had but little before them in the way of example, to guide them in their enterprise. The consequence has been an occasional modification of the plan of the work, from time to time, in order to meet the actual or supposed wants, which it was the purpose of the journal to supply. After an experiment of nine years, however, the several subjects, which demand the attention of an American law periodical, are now more clearly and fully ascertained, than when the *Jurist* was first commenced; and, though the present Editors do not contemplate any material departure from the plan hitherto pursued, they think it will be useful, nevertheless, both for their own future guidance, and for the

information of their readers, to review in detail the general design and objects of their journal, and to explain the manner in which it is their purpose to conduct it.

The materials, of which the *American Jurist and Law Magazine* is composed, and which seem to be essential to constitute a journal of American law and jurisprudence, are usually arranged, and may properly be considered, under six different heads or departments.

I. The first department, under the general title of the *AMERICAN JURIST*, occupies from a third to a half of each number, and embraces original essays on law, jurisprudence, legislation, and collateral subjects; opinions of eminent counsel on difficult and interesting questions; discussions of constitutional and other legal topics; reviews of works on law and on subjects connected therewith; biographical sketches of distinguished judges and lawyers; and historical and other accounts of the civil and juridical institutions of foreign countries.

II. The second department is designated by the term *JURISPRUDENCE*, which is here used to denote the application of the principles and provisions of law, properly so called, in the practical administration of justice. This, it is believed, is the strict signification of *jurisprudence*, as distinguished from *law*; and, if any apology be necessary, for this use of the word, in a sense somewhat more definite and limited than is usually given to it, the Editors trust it will be sufficient to remark, that, in this sense, it exactly expresses, what no other single word can do, the character of this head of their journal. This division is intended to contain, 1, a digest of the most recent English decisions at common law and in equity; 2, a digest of the most recent American cases; 3, miscellaneous cases, which are not reported for insertion in any volume of reports, or which are published in advance of their regular publication, on account of their peculiar importance; and, 4, occasional notices of

interesting or curious decisions of the tribunals of continental Europe.

In the selection of cases, for insertion under the head of Jurisprudence, the Editors are now compelled, by reason of the increased and rapidly increasing number of the volumes of reports, which are annually published, to confine themselves more strictly than was formerly necessary, to those subjects which are not only of general but are likely to be of permanent interest. They consequently find themselves obliged to exclude from their digest all cases, in which points of pleading or practice only are decided, or which relate merely to the forms of proceeding,—also, all cases involving the construction or application of a purely local statute, or custom,—and, lastly, all cases relating to the construction of wills, contracts, trusts, &c., in which the points decided cannot be made intelligible, without the introduction of long and intricate statements of facts.

This department of the Jurist renders the work of peculiar value, and, indeed, almost indispensable to the practising lawyer; to whom it must be of the highest importance, to have the earliest possible information of all the new decisions.

III. The third division, under the title of **LEGISLATION**, is appropriated to notices of the most important and generally interesting legislative proceedings of the congress of the United States, and of the legislative assemblies of the several States. When this head was first adopted, a summary of the entire legislation of each was given, without regard to the nature and character of the several topics embraced in it. But, in consequence of the great increase in the amount of annual legislation, which has since taken place, this is no longer possible, within the space allotted to this subject; and, it is hardly desirable, inasmuch as almost the entire mass of legislative proceedings consists of private acts and of what may be called sovereign administrative acts; while,

of those statutes, which, properly speaking, constitute general laws, very few introduce any new principle.

It is scarcely necessary to remark, that this department of the Jurist is intended as a sort of journal of legislation ; and that it is consequently confined to the new enactments, which are officially promulgated on the adjournment or dissolution of the several legislative assemblies. When a new digest, revision, or general collection of statute law is published, it is considered as a new work, rather than as a new legislative enactment.

The Editors flatter themselves, that this portion of their journal will not be destitute of interest, for those of the statesmen and jurists of foreign countries, who regard the working of our civil institutions with some curiosity or solicitude ; while, at the same time, it will be found of much practical utility to those of our own citizens, who may have occasion to inform themselves of the changes, which are constantly taking place in our statute laws.

IV. The fourth department of the Jurist is devoted to CRITICAL NOTICES of the works on law and its kindred topics, published in this country, whether original or reprints of foreign works, and also of many of the English publications, and occasionally of those which appear on the continent of Europe. These notices are not intended as elaborate reviews or criticisms, but merely as short accounts of the general plan and contents of the works noticed, accompanied by such critical remarks as may occur to the Editors. An advertisement on the cover of a French Law Periodical, the *Revue Etrangere et Francaise*, notifies those publishers and booksellers, who desire to have their publications announced in that journal, to transmit "the usual two copies" to the office of the editor. The Editors of the Jurist do not intend to make the transmission of *two* copies or even of *one* the condition of the publication of a notice in their journal ; but whenever they shall be favored with a copy of any new

work, coming within the range of topics included in their plan, they will insert a notice of it in its order. And, in this connexion, they take occasion to say, that, not merely those works, which make some pretension to permanent utility and general interest, but even those of a transitory and ephemeral character,—such as occasional addresses,—interesting trials,—legal opinions,—law tracts,—controversial writings on any juridical topic,—and, in short, all publications, which may serve in any degree to illustrate the history, explain the practical operation, or lead to the improvement, of our laws and their administration, are so far embraced in the plan of the *American Jurist*, as to be considered proper objects of a critical notice.

V. The fifth department, that of INTELLIGENCE and MISCELLANY, scarcely requires a word of explanation. It comprehends items of legal intelligence, anecdotes, obituaries, notices of judicial appointments and other miscellaneous matters, which, not being included under any other head of the journal, are yet capable of furnishing its readers with somewhat of instruction or entertainment.

VI. The QUARTERLY LIST OF NEW PUBLICATIONS is intended to contain the titles of the works on law, published in Europe and America, as they appear from time to time. The titles are accompanied, when necessary, by a translation; and, under them, is sometimes inserted a brief remark, or a reference to some periodical, in which the work is noticed or reviewed. Under this head, also, such works in preparation and in press are announced, as the Editors may happen to be informed of, or may be requested by their authors or publishers to notice.

Two numbers of the *Jurist*, paged continuously, constitute a volume; and the last number of each is accompanied by a title page, table of contents, and an index. A general index, to the first ten volumes, paged in continuation of the tenth volume, and making a part of it, was published shortly

after the publication of that volume. A second general index of the ten volumes, from eleven to twenty inclusive, will probably be published, for delivery with or shortly after the fortieth number.

The Editors have thus presented, more at length, perhaps, than is strictly necessary, the general plan and objects of their journal; and it now remains for them to say a few words, in explanation of the manner, in which they propose hereafter to conduct it.

The principal changes, which have been introduced, since the commencement of this publication, have already been adverted to, in the foregoing explanation of the several parts, included in the general plan of the *American Jurist*. There are two, however, which have not been mentioned, and to which the Editors will now call the attention of their readers.

The first is the practice of affixing the initials of the writers to their articles; which, though not considered as indispensable, has been adopted as the general rule. The Editors thus have it in their power, as the nature of the topics, discussed in the pages of their journal, makes it proper they should have, to relieve themselves from being responsible for the opinions advanced in the articles which they publish, or for the inferences which might possibly be drawn from them. In general, therefore, the articles published in the *Jurist* will be signed with the initials of the several writers; and must consequently be regarded as expressing their sentiments alone. The papers, prepared by the Editors themselves, are not to be deemed exceptions. The short critical notices of new books, whether by the Editors, or their correspondents, will not be signed in the manner above-mentioned, and are to be considered as editorial.

The other change alluded to, which, however, is not entirely new, is the occasional introduction of articles from foreign journals, and, in particular, translations from those

of France or Germany. In addition to the reasons, which make the legislation and jurisprudence of each of our several States interesting in all the others, and which are equally true, though not to the full extent, of the legislation and jurisprudence of the various countries of Europe, it may be said of the law of each of those nations, as a late eloquent and profound writer says of their history, that it "terminates in that of America." But this consideration does not, by any means, furnish the only or even the strongest inducement, for an occasional resort to the rich stores of instruction, which have been provided by the labors of the learned jurists of continental Europe. Every department of juridical science is there cultivated with great ardor and success; and some of those subjects, which are now attracting the attention of our jurists and statesmen, in the various branches of law reform, are there investigated with a thoroughness and vigor, which we can scarcely hope to equal, and with the aid of many sources of information, of which we must always be deprived. For these and other less weighty reasons, the pages of the *Jurist* will occasionally contain an article extracted from some foreign periodical or other work, on a subject of general interest to its readers, or a notice of some foreign work, which it may be thought desirable to make known here.

It is not to be expected, that a public journal of any kind should be so ably conducted, as never to err, or so fortunate in the selection and judicious in the treatment of its subjects, as never to give offence; the Editors of the *Jurist* are duly conscious that they can neither claim to be exempt from human weakness, nor hope to be free, at every moment, from human prejudices and passions; they will, therefore, be always ready to open their columns for the correction of any mistake of doctrine or fact, to which they may have given the sanction of a publication in their journal.

The nature of the subjects, which occupy the pages of the

Jurist, is such, that very few if any of them are ever likely to become identified with the professed objects of a political party; there is little, therefore, connected with the legitimate purposes of their journal, to induce the Editors, as such, to lend their aid to the advancement of a party project; and, were it possible for them, under the pretence of conducting a law journal, to prostitute their columns to such a service, they feel certain that the support and favor, which they are now receiving from individuals connected with all parties, would be justly withdrawn.

There are two subjects, embraced in the general plan of the *American Jurist*, which, though falling within the scope of the foregoing remarks, require to be noticed more particularly: these are the subjects of Law Reform and of Constitutional Jurisprudence.

In reference to the former, the Editors of the *Jurist*, from its first establishment, have considered it to be one of the great objects of their work, to promote improvement, by affording free scope for the discussion of proposed alterations in the laws; and, though a particular law reform may sometimes happen to make one of the ostensible objects of a party, yet, inasmuch as it is wholly impossible, from the nature of our government and institutions, that this should be the case to more than a limited local extent, the Editors will not suffer themselves to be deterred, by any such considerations, from admitting a free discussion of the subject in the pages of their journal.

In regard to the subject of constitutional jurisprudence, it is well known, that the power, exercised by the courts of the United States, in controlling the legislation of congress and of the several States, in certain cases, and the jurisdiction conferred upon those courts to the exclusion of the state courts, in reference to certain persons and subjects, have introduced a political element into the functions of the federal judiciary; and, this, as was to have been expected, has led

to a division of our jurists and statesmen into two opposing sects or schools, which would perhaps characterize each other, respectively, as the favorers, the one of a more strict, and the other of a more liberal, interpretation of the constitution. The liberal school (if we may venture so to speak), after a long and brilliant career, is at present without doubt yielding ground to its rival. The conflicting principles, which lie at the foundation of the doctrines of these opposing schools, are so far political in their character, and so identical with those, which have always divided and still divide our thinking men into two great political sects, more or less corresponding with the political parties of the day, that it is not probable the struggle between them will ever be terminated, though the subjects with which they may at any particular time be connected, may cease to have any interest in the public mind. The columns of the *American Jurist* are open alike to both of these opposing schools.

It will be the constant and anxious aim of the Editors of the *Jurist*, that all the articles which appear in their journal, whether prepared by themselves or others, should be characterized by a spirit of candor, freedom and impartiality. In reference to this part of their editorial duty, their only desire is to promote the highest welfare of their fellow citizens, so far as that is connected with the several subjects of a law journal, or can be effected by a free and full discussion of those subjects; and the only means, which they propose to make use of for that purpose, are to promulgate and defend those principles of truth and right, which ought ever to be kept in view by the legislators who make, the people who live under, and the judges who administer, human laws.

This article will be appropriately brought to a close, by a very brief review of the juridical literature of the United States. That branch of general literature, which may be denominated the juridical, consists chiefly of the authorita-

tive promulgations of the legislative power, in the form of statutes or codes; of the reported proceedings and judgments of the courts of justice; and of the treatises, commentaries, digests, and elementary works of private individuals.

The statutory enactments of the United States, and of the several States, are adapted to the vast variety of wants, local and general, of several independent communities of enterprising and industrious people, whose wants find an immediate expression in their legislative assemblies: these enactments are consequently as miscellaneous in their character, as the exigencies which give birth to them; and as diversified in style, as the productions of every variety of talent, of education, and of pursuit, must necessarily be. Of our statute laws, considered as a branch of juridical literature, it may be said, in general, that they are much improved upon the verbosity, intricacy, and repetition of the statutory legislation of Great Britain, upon which ours has been modelled. This improvement is nowhere so remarkable, as in the consolidations and revisions of statute law, which have been recently executed in some of the States.

It is now scarcely more than fifty years, since the first volume of American cases was published; and it is not too much to say, that, within that time, no country has done so much in this department of juridical literature. Various causes, connected with our habits and institutions, have contributed to this result; and, perhaps, not the least among them is, that, by reason of the authority attributed to judicial decisions, it has now become the general custom for judges to write out their opinions at length, with the expectation that they will be published, and constitute an authoritative exposition and application of the law.

In the department of elementary works on legal topics, we have, perhaps, not fallen behind the English (except in number), while we are still greatly in the rear of the conti-

mental jurists. This deficiency is in part attributable to that overweening haste and incessant activity, which are our national characteristics, and which induce us to send all our literary productions, almost without exception, into the world in a crude and unfinished state ; but yet more to the fact, that the materials for the composition of elementary works of the very highest order, have not as yet existed among us in the requisite abundance. We are now in the transitionary state, between the common law of England, and that which is to be the common law of federated America. The former is every where giving way, and the latter every where assuming its proper shape and consistency ; and, with this change, works on American Law are beginning to appear, which give excellent promise of what this branch of our juridical literature is destined to become.

The talents and energies of our citizens are mainly directed into those channels, which lead the most quickly to wealth or honor ; the labors of our jurists are consequently almost wholly absorbed in the arguments of litigated cases at the bar, or in their decision upon the bench ; little, comparatively speaking, is left to be devoted to that species of juridical literature, which, for the most part, fills the pages of a law journal ; but the past history of the American Jurist affords abundant testimony, that the talent and energy of American lawyers have not been entirely exhausted in the discussions of the forum ; and the Editors cannot but indulge the hope, that, instead of diminishing in number and ability, the contributors to their journal will in future not only help to sustain but to advance its character. Those gentlemen, who have heretofore contributed to the pages of this journal, are respectfully invited to continue their friendly aid ; and those, who may hereafter feel inclined to become its correspondents, are assured, that they shall receive the candid attention and cordial acknowledgment of

THE EDITORS.

ART. II.—ON THE LAW OF POSSESSION.

Analysis of Savigny's Treatise on the Law of Possession.

By PROFESSOR L. A. WARNKÖNIG.

[One of the most remarkable productions, in which the labors and discoveries of the modern jurists of continental Europe, in the department of the Roman law, have been turned to practical account, is the work of Mr. von Savigny, *On the Law of Possession*. This celebrated treatise was first published in 1803. It was much enlarged and improved by the author, in succeeding editions, and received his last correction and revision, in the fifth edition, which was published in 1827. This work may, in some respects, be considered as the *chef-d'œuvre* of the German historical school; and, for that reason, as well as on account of its practical value, has received great attention from the enlightened jurists of continental Europe. Mr. Lerminier, who published an analytical exposition in Latin of Savigny's treatise, (*De Possessione analytica Savignianeæ Expositio*), pronounces it to be the most beautiful book of Roman law, which has been written since the sixteenth century.

An analysis of it, in French, was also prepared by Professor Warnkönig, one of the editors of the *Themis*, and published in the third, fourth, and fifth volumes of that journal. This analysis, or rather abridgment, was subsequently republished by itself; and, having been submitted to the examination of the author, received his entire approbation. The third edition of it, published in 1827, was "carefully revised, corrected, and adapted to the fifth edition of the original work."

We have been induced, by the character of this celebrated

treatise, as well as the interesting topic of which it treats, to republish the analysis of it in our journal. It will be found useful, not only to the student of the Roman law, but to the practical lawyer; and to the latter, more especially, for the reason, that most of the principles, which relate to possession, must necessarily be the same or similar in every system, and we have no separate treatise on this subject, drawn from the fountains of the common law.

The analysis is divided into three articles. The *first* contains an exposition of the plan of the work; the *second* is an abridgment of the system of the law of possession, adopted and developed by Savigny; and the *third* is devoted to the subject of interdicts, or the remedies for an injury to the possession.

In preparing the following translation of this analysis, we have had recourse throughout, in every case of doubt, to the fifth edition of the work itself, in the original German, and have thus avoided the errors, into which we might have fallen by confining ourselves exclusively to the work of Mr. Warnkönig.]

FIRST ARTICLE.—EXPOSITION OF THE PLAN OF THE WORK.

HAVING been invited by several of the editors of the *Themis*, to make known in France Savigny's *Treatise on Possession according to the Roman Law*, I find myself embarrassed, in more than one respect. Since the first publication of this work, in 1803, it has enjoyed a high consideration in Germany.¹ The doctrine, which it sanctions, in reference to the principal points of this part of the law, is now generally diffused in that country; and I ought, there-

¹ The second edition was published in 1806, the third in 1818, and the fourth in 1822. In this analysis, I shall make use of the fifth, which is on the point of publication. [The fifth appeared in 1827.]

fore, in this analysis, to endeavor to preserve for the work, in the eyes of foreign juriconsults, a reputation, which it justly merits. But, for several reasons, it will be almost impossible for me to succeed in this attempt. The style of the author, which is concise and condensed, includes many ideas in few words; and it will be very difficult, within the limits prescribed by the nature of this collection, to give the reader a just idea of the system of Mr. von Savigny, without causing his work to lose much, in the process of analysis. The method, which he has followed, is also new, especially in France; and it will therefore probably encounter some prejudices, to overcome which it will require to be developed at some length. And, finally, among the reasons, which ought to avail me by way of excuse, if I should not succeed in satisfying the reader, I shall refer to the difficulties of the matter of Possession, which is regarded by all the interpreters as one of the most obscure and intricate subjects of the Roman legislation.

In the composition of his treatise, Mr. von Savigny proposes to discover, by an exact and rigorous interpretation of the texts, relative to Possession, the ideas which guided the Roman juriconsults, in their decisions upon that subject, and the system which lies at the foundation of their decisions. He seeks to determine the influence, which the ancient laws, the edicts of the prætors, and the imperial constitutions have successively exerted upon this part of the Roman jurisprudence. He devotes himself principally to the sources of the law; which he examines, like a profound philologist, aided by an acute criticism, and under the influence of that philosophic spirit, which is indispensable to throw light upon whatsoever belongs to the domain of history. The most esteemed editions of the *Corpus Juris*, and the most celebrated manuscripts (particularly those of the public libraries of Paris, with which the author is thoroughly acquainted), have been explored with care; and no means

have been neglected, for the correction of the text of all the passages of the *Corpus Juris*, which concern this matter. In short, to make the nearest possible approach to perfection, Savigny not only makes use of all the assistance, which the history of the law and the study of the ancient authors can offer him ; but, as if distrustful of his own powers, he has mastered and analyzed all the works of his predecessors in the same career, from the time of the first glossators down to the present day ; and his indefatigable patience is equally mindful of those, whose names are the least known, and of those whose reputation is the best established. Considered in this respect, his work presents us a complete history of this part of the Roman jurisprudence, as it exists among the moderns.

The author, thoroughly comprehending the subject, which he had undertaken to discuss, perceived, at once, that the matter of Possession ought not to be compared with the greater number of the other objects of the law. Possession in itself is but a fact, and cannot present those questions of law, which so frequently arise in the interpretation and application of the rules of positive law. Mr. von Savigny, therefore, does not seek to support the opinions or the interpretations, which he presents, by the authority of practitioners or the decisions of courts. This would have been entirely foreign to his purpose ; which, as I have already remarked, is to discover, in the sources of the Roman legislation, and to demonstrate, by an explanation of the fragments of it which remain, the system and the ideas of the jurisconsults of that nation concerning possession.

His work seems to be purely theoretical ;¹ but his theory, historically demonstrated, adapts itself very well to the practice, upon which the treatise of Mr. von Savigny has

¹ In this respect, there is the greatest difference between Savigny's treatise, and that of Pothier on the same subject.

already, in fact, had the most beneficial influence, in those parts of Germany, where the Roman law has preserved its authority. It may even be said, that this treatise will not be without its utility every where; for the decisions of the Roman jurisconsults on this subject, being founded in the nature of things, must be regarded as written reason; and, consequently, may be followed, wherever they are not in opposition to any particular law.

The object of this analysis being somewhat complicated, it seems useful, before proceeding to an exposition of Savigny's system, to indicate the plan followed in his work: this will form the subject of the present article. The second will contain an exposition of the system in general. The third treats specially of interdicts.

The *Treatise on the law of Possession* is composed of six chapters or sections, preceded by an introduction of forty pages, in which:

1. The author, in the first place, makes known the sources of this matter, both in the *Corpus Juris* of Justinian, and in the fragments of the ancient Roman law, which have come down to us. To this last head belong: the title *de interdictis* of Gaius, known in part since 1816¹; *Pauli receptæ sententiæ* (l. v. tit. 2, and tit. 6. *de usucapione et inderdictis*); and some titles of the Theodosian Code. In the *Corpus Juris*, the author refers not only to tit. 2, book xli. of the Digest, *de acquirenda vel amittenda possessione*, to the 16th and 17th titles of book xliii. *eod.*, and to the 32d title of book vii. and the 4th and 5th titles of book viii. of the Code; but also to many other titles, where the matter of possession is treated of incidentally. Mr. von Savigny follows the edition of the *Corpus Juris*, published by Gebauer and Spangenberg (Gottingen, 1776 and 1797), which is always to be preferred to those of Godefroi. He indicates also the

¹ See the *Journal of Historical Jurisprudence*, vol. iii. p. 120.

manuscripts and the other editions of merit, which he has consulted the most frequently.

2. He then passes in review the works, which have treated of this head of the Roman law, from the time of the revival of that system in Europe to our own times. This historical view is rendered very interesting, by the judicious observations of the author.

The glossators, Placentinus (in 1192), Azo (in 1224), Rofredus (after 1243), Accursius (who composed his gloss from the writings of his predecessors), and Odofredus (the contemporary of Accursius), though unacquainted with history and philology, succeeded in acquiring a tolerably profound knowledge of the sources of the law: and, upon many points relative to possession, they had more just and sound ideas, than the later interpreters.

The writings of Bartolus, Baldus, and the other commentators, who lived between the time of Accursius and the commencement of the sixteenth century, according to Savigny, are made up only of disgusting repetitions, unaccompanied by the least criticism, and overloaded with the scholastic trifling of the fourteenth and fifteenth centuries.

Among the authors of the sixteenth century, so celebrated in the history of jurisprudence, our author especially distinguishes those of the French school; and, among them, he gives the palm to Donellus, who, in his *Commentarii Juris Civilis*, book v. c. 6—13, and book xv. c. 33—38, in treating the matter of Possession, has given proofs of a rare talent for analysis, and of great sagacity. Among the commentators upon the titles of the Digest or of the Code, relative to Possession, Cujas, in the opinion of Savigny, is not the writer, who has the best succeeded. The contradictions, with which this great jurisconsult has always been reproached, in his numerous writings, are more frequently to be observed in this than in any other part of his works. Duarein, the adversary, and, for some time, the colleague,

of Cujas, at Bruges, seems to have succeeded better than he.¹ Some degree of esteem must also be accorded to von Giffen (Giphanius), a Belgian by birth, who taught in the German universities, and died in 1694. He was one of the most acute interpreters of the Roman law.²

Among the authors of the seventeenth century, who wrote on Possession, we remark particularly the Italian juriconsults, Merenda and Galvani, the first of whom published a very extended treatise on that subject, in his *Controversiæ Juris*.³ The other treats of Possession, in a very highly esteemed work on Usufruct. By the side of these interpreters, Mr. von Savigny ranks several Spanish authors, such as Melchior de Valentia, Ramos del Manzano, and his pupil, Ferd. de Retes. Their writings are in part included in the *Thesaurus* of Meerman.⁴

The last century produced two remarkable works on the Law of Possession : the one is that of the celebrated Pothier,⁵ who, according to Mr. von Savigny, explains the ideas, which are the most generally received on that subject, with his ordinary talent ; the other is the work of Jaques Cuperus, of Amsterdam. This last work appeared at Leyden in 1789,⁶ in the form of a dissertation, which contains, says Mr. von Savigny, some profound researches and happy interpretations ; but the author (who besides promised a sequel to his work), discusses some few only of the principal questions relating to possession, and merely indicates the others ; so that this dissertation (reprinted by Mr. Thibaut, at Jena, in 1804) leaves much to be desired.

¹ Opera, Lugduni, 1584, fol. p. 816—872.

² *Lecturæ Altorphinæ ad tit. 2. lib. xli. Dig., vol. ii. p. 394—526 ; et Codicis Explanatio, pars ii. p. 242.*

³ Lib. xii. c. 1—29. ed. Brussels 1746, tom. v.

⁴ Tom. vii. p. 78—114, p. 454—494.

⁵ In citing the works in which Pothier has treated of Possession, Mr. von Savigny has omitted the Commentary on the Custom of Orleans.

⁶ *Observationes de natura possessionis*, 120 pages in 4to.

After this treatise of Cuperus, and in chronological order, comes that of Savigny, which was soon followed by several others, destined, for the most part, to combat it.

The whole number of authors, mentioned by Savigny in this introduction, is [in 1827] fifty-six.

We shall now proceed to explain the method pursued in the body of the Treatise.

The first chapter, entitled *Notion or Idea of Possession*, is intended to give a precise idea of the signification, presented by the words *Possessio* and *Possidere* in the different texts of the Roman law. Savigny indicates the point of view, under which this whole matter ought to be regarded; and his remarks, in this respect, which extend through twelve paragraphs, seem to be entirely new. After examining what belongs to fact, and what to law, (*quid facti juris-ve?*) in possession, he distinguishes the latter into divers kinds, and applies himself particularly to prove, that, according to the Roman law, possession must in the outset be divided into *Civil Possession*, *Possession properly so called*, and *Natural Possession*. The author determines the nature of possession, and shows wherein it differs from simple detention. He finishes this chapter by a criticism of the definitions, given by those who have written before him on this matter, and by an examination of the question, which its difficulty has rendered so famous, namely: "whether several persons may simultaneously have the possession of the same thing?"—a discussion, which throws great light upon the nature of possession. The true meaning of the words *juris possessio*, or *quasi-possessio*, then becomes the object of the researches of the author, and he concludes by indicating the principal reasons, which led the Roman jurisconsults to treat possession as a matter of law absolutely different from all others. This last point is one of the additions, which have been made to the work, since the publication of the third edition.

The second chapter treats of the *Means of acquiring Possession*, or of the *Conditions necessary to such Acquisition*, namely; the real apprehension of the thing (*factum possessionis*) and the intention to possess or appropriate the thing (*animus possidendi*).

This chapter is divided into three parts. In the first, the author explains what constitutes the fact of possession: in the second, what is to be understood by the will to possess: and, in the third, in what manner one may acquire the possession by means of a third person. The theory of Savigny differs essentially from that of all the other commentators, and his opinions on the nature of the fact of apprehension (of the thing of which one wishes to acquire the possession) are entirely new. Our author demonstrates, conclusively, that, in none of the fragments of the *Corpus Juris*, is a mere symbol or a fiction ever considered as capable of constituting this fact; but that the idea of the Roman juriconsults was, that every fact, by which a person is put in a situation to dispose of a thing, whether movable or immovable, at his pleasure, must be considered as constitutive of the possession; and a great number of examples, drawn from the laws of the Digest, are here brought forward, to confirm the theoretical demonstration of the author. From this principle several consequences result, which are afterwards developed in the work; one of the most important of which is, that the Romans never had any knowledge of the *symbolical delivery*, so gratuitously imagined by the modern interpreters.

The will to possess—the capacity to have this will,—and several questions, concerning the things which may be the object of possession, for example, the questions, whether one may have the will to possess a thing by parts, and whether the possessor of a building has also the possession of the materials, considered as particular things:—are the matters, which subsequently receive the attention of the author.

He proves, that the *animus possidendi* is simply the will to be the proprietor (with the exception of some cases, in which the intention to possess by other titles is assimilated to this will); from which it follows, that the usufructuary, the commodatary, the locatary, &c. cannot be regarded as possessors. These developements are followed by a clear and precise exposition of the principles, concerning the conditions requisite for the acquisition of possession, by means of a third person; and it cannot be doubted, that Savigny has seized the true spirit of the decisions of the Roman juriconsults, in regard to all these thorny questions. This chapter is terminated by an explanation of what the interpreters denominate the *constitutum possessorium*.

The subject of the third chapter is the *Loss of Possession*. It is lost, according to the author, either by some act, or by the will; and he reconciles this principle with the law 153, D. *de reg. jur.* and the law 8, D. *h. t.*, to which it has always hitherto been thought opposed. He then enumerates the cases, in which possession is lost by the *will*, and those in which, on the contrary, an *act* is the cause of the loss. He examines, finally, in what manner a third person may preserve, for us, or make us lose, the possession. Several questions here present themselves, which are very skilfully treated, and, among others, the following: In what manner, the possession of an immovable, belonging to an absent person, is lost, when this immovable is in the occupation of another; and when can the fraud of one, who possesses in our name, operate to deprive us of possession. The result of the principles, investigated in this chapter, is of the highest importance, in regard to the matter of prescription, and especially with reference to the interruptions, which may intervene against it.

The theory of *interdicts*, or of the *actions* introduced for the guaranty of possession, is placed in the fourth chapter. The origin,—the true end,—and the nature of these posses-

sory actions;—and the procedure in relation to them,—are made the subject of interesting researches. According to Savigny, two kinds of interdicts only are possessory, viz: *interdicta retinendæ* and *interdicta recuperandæ possessionis*, which include the interdicts *uti possidetis*, *utrubi*, *unde vi*, and *de precario*: the reasons, for excluding the interdicts *adipiscendæ possessionis* from this category, are given; and the author also explains why there is no interdict *de clandestina possessione*. He subsequently develops the rules to be observed in possessory interdicts. The changes, made by the emperors in this system, find a place at the end of the chapter.

The following chapter, the fifth, is particularly devoted to the *Quasi-possession* of personal and real servitudes, and of other rights of the same nature. The difficulties, presented by this part of the subject, are skilfully resolved by the author; who explains in what manner the quasi-possession is acquired, in relation, 1. to interdicts; and 2. to prescription;—and also in what manner it is lost. The relations between the different interdicts peculiar to some servitudes, and the cases in which the *uti possidetis* is applicable, are very well explained in this chapter.

The different modifications, which the Roman law has undergone, by the general laws of Germany, are indicated in the sixth chapter; which contains also some reflections on the nature of possession and quasi-possession, since the introduction of these changes, and on the actions, which have for their object to preserve or to revendicate the possession, and which were introduced by the canon law. Some articles of this law¹ are interpreted; and the end and effects of the *possessorium summarissimum*, introduced into the different states of Europe, in the thirteenth or fourteenth century, are also explained.

The author terminates his work with this observation:

¹ Redintegranda, c. 3, C. 3. q. 1.

that the basis of the system of the Roman laws, in the matter of possession, still subsists in the common law of Germany ; and, consequently, that the principles, contained in the titles and fragments of the *Corpus Juris Romani*, are still applicable in practice.

Our author says nothing of the doctrine of possession, contained in the French codes. This did not come within the scope of his design. Mr. Planck (now a counsellor in the chancery of justice at Gottingen), attempted, in 1812, to treat this part of the French law, according to the system of Savigny.

ARTICLE SECOND.—THEORY OF POSSESSION.

§ 1. *Nature of Possession in the Roman Law.*

The definitions of Possession, given by the authors, have all of them a common point, viz. that, by this word, taken in its most general sense, is meant the fact of the *detention of a corporeal thing*, giving to an individual the power of disposing of it at his will, and to the exclusion of every other person. This fact corresponds to the most extended right, which one can have over a thing, namely, the right of property.

If it were possible, that a system of law should be limited, in reference to this matter, to the expression of the following principles : “ the proprietor alone has the right to dispose of the thing, which belongs to him ; and the possessor must be considered as the proprietor : ” the theory of possession would become extremely simple.

But it frequently happens, that the property and the possession are found to be separated ; and inasmuch as the public interest requires, that the latter should be invested with some rights, that is to say, that it should be protected against those, who might wish to despoil the person in possession of his possession, it becomes necessary to provide rules, to determine when one ought to be reputed to have

acquired or lost the possession. The necessity of these regulations shows how difficult it is, to give a just definition of the elements, which constitute this fact in the eye of the law.

All systems of law contain principles concerning possession. A matter of so much importance, and with which the public order and the general tranquillity are intimately connected, could not be overlooked by any legislator. But all these systems have not attributed rights of equal extent to possession. These rights, nevertheless, have an influence upon the idea of the thing itself, and render a peculiar definition necessary, in every system. We shall now proceed to examine what are the rights, attached by the Roman legislators to the fact of possession.

In the ancient legislation, as well as in that of Justinian, two rights appear to be properly and exclusively the effects of possession, viz. *interdicts* and the right of *usucapion*: *usucapion* resulted from a possession in virtue of the civil law, that is to say, the law of the Twelve Tables; *interdicts*, on the contrary, were introduced by the prætor, for the provisory maintenance of every possession, which was not proved to have been unjustly acquired. These are the only rights, which can be considered as the effects of possession; and it is in reference to them, that the Roman jurisconsults fixed and developed the principles and the idea of possession.

The modern interpreters enumerate, indeed, a much greater number of rights attached to possession,¹ the principal of which are: 1. The acquisition of the property, in the cases of occupation and of delivery; 2. The publician action; 3. The ownership of the fruits received by the possessor in good faith; 4. In dubio possessor potior, from

¹ Savigny observes, that one commentator enumerates as many as one hundred and seventy-two different rights, resulting from possession, in order to prove the truth of the *beati possidentes*.

which results the obligation of proof, imposed upon the demander, in contestations concerning the property; 5. The right to defend the possession by force; and 6. In some cases, the right of retention.

But the three last rights are not exclusively attached to possession; for every detainer, even without being considered as the possessor, may avail himself of them: they result, in favor of possessors, from the application of other more general principles of the law, drawn from the common procedure; *actori incumbit probatio; eo non probante, absolvitur reus, etiamsi nil præstiterit*. The defence of one's self, by force, is a right, which belongs to every man, and in every case of necessity. It is not the possession, which, in the fact of occupation or delivery, attributes the property; it is rather the act of apprehension of the thing, which, besides the possession, gives also the property, when it is accompanied by the other conditions required by the law. The publician action and the right of the *fructuum perceptio* are effects, which the prætors attached to the possibility of prescribing by usucapion, rather than particular rights resulting from possession alone. The effects of possession may therefore be truly reduced to the *right of usucapion* and *interdicts*; so, that in the system of the Roman law, the question of possession,—of what constitutes it, and distinguishes it from simple detention,—and of the modes of acquiring and of losing it,—arises only in relation to these two sorts of rights.¹

One consequence of these general considerations is, that possession, though, in its origin, it is only a fact (*res facti*), is nevertheless of right (we do not say a right; *non jus, sed juris*), because its primitive nature and the vulgar notion of it are modified by the principles of law. Thus, possession,

¹ See in the Institutes, lib. iv. tit. 15; in the Digest, lib. xli. tit. 2; and in the Code, lib. vii. tit. 32. Savigny, §§ 3 and 4.

properly so called, is distinguished from simple detention ;— a distinction, which is fundamental in this matter.¹

From this consequence, it results : that the law admits or sees possession, in some cases, in which it does not physically exist ; and sometimes does not acknowledge its existence, when, in common language, some person is nevertheless considered to be the possessor.

The interpretation of the numerous texts of the Corpus Juris, which relate to possession, depends, in a great degree, upon the sense in which we ought to understand some expressions of the Digest and Code. But the doubt and obscurity, which envelope the meaning of these expressions, have furnished matter for discussions and controversies without number. We refer here to the distinction between the words: *civilis possessio*, *naturalis possessio*, *civiliter possidere*, *naturaliter possidere*. Before Savigny, none of the interpreters had succeeded in explaining the distinction, which these terms imply, without encountering in the fragments of the Roman law contradictions and anomalies, which all the efforts of the jurisconsults were unable to reconcile. Our author presents us with an interpretation, which removes all difficulties. The following is an analysis of it :

Possession must be distinguished into three kinds ; civil possession, possession properly so called, and natural possession.

1. *Civil possession* is that, which, commencing by a just title, and being accompanied with good faith, (*opiniōe domini*) may terminate by giving the property by usucapion.

2. *Possession properly so called* is that, which gives to

¹ This distinction reconciles the l. 1, § 3, D. h. tit. : *Ofilius possessionem rem facti non juris esse ait* ; l. 19, D. 4, 6 ;—l. 53, D. 41, 1 ; l. 49, D. h. tit. *Possessio plurimum ex jure mutuatur*.—By the expression *jus possessionis* (the right of possession), in different passages, must be understood the true possession conformable to the principles of law. Savigny, § 5.

him, who enjoys it, the advantage of being able to resort, for the preservation of his possession, to the interdicts of the prætor. It exists, when one detains a thing, with the intention of appropriating it to himself. Sometimes it is put in opposition with civil possession, and then it is called natural possession, like that of which we are going to speak.

3. *Natural possession*, lastly, is that, which results from the detention of a thing, without the will to make it our own. It is frequently opposed to possession properly so called.

Civil possession has all the properties of possession properly so called; but it has also some others, which bring with them the right of usucapion. The principal object, therefore, of the theory of possession, must be possession properly so called, that is to say, that possession, which is guarantied by interdicts; and this point of view must direct the interpreter of the laws on this subject.

In support of these definitions, Savigny brings forward the following proofs, viz. :

The word *civilis*, as contradistinguished from the word *naturalis*, is used almost always to signify an engagement, which produces an effect of some sort, in virtue of the civil law, (as opposed to the law of nations and the prætorian law); thus, *cognatio civilis*, in the language of the laws, is the same thing as *agnatio*, with the effect which the law of the Twelve Tables attributed to it. He cites also the expressions *obligatio civilis*, *actio civilis*, the sense of which is sufficiently known.

Analogy, therefore, leads to the conclusion, that civil possession is a possession, the effects of which depend upon the civil law, this phrase being used in its most restricted sense. One of the effects of it is to lead to usucapion; and, consequently, this kind of possession is sufficiently distinguished from the others, when we say, that civil possession is that which gives rise to usucapion. Several passages of the

Pandects, in which *possidere* and *civiliter possidere* are put in opposition with each other, confirm this reasoning.

We see, for example, that the Roman laws say of a wife, that she has not the civil possession of a thing, of which her husband has made her a donation, but that nevertheless she has the possession of it; and we see, besides, that she cannot prescribe, though she is entitled to the interdicts; ¹ l. 26, pr., D. 24, 1, *licet illa (uxor) jure civili possidere non intelligatur*; l. 1, § 4, D. h. t., *Si vir uxori cedat possessione, donationis causa plerique putant POSSIDERE eam, quoniam res facti infirmari jure civili non potest*; l. 1, § 9 and 10, D. 43, 16, *dijcitur is qui possidet, sive civiliter sive naturaliter, possidet; nam et naturalis possessio ad hoc interdictum (DE VI) pertinet; denique (that is to say, thus, equally), et si maritus uxori donavit, eaque dejecta sit, poterit interdicto uti, non tamen si colonus*; l. 1, § 2, D. 41, 5, *Si inter virum et uxorem donatio facta sit, cessat usucapio*.

These passages, scattered through the Digest, being brought together, prove clearly, that the wife is considered as the possessor of the thing, which her husband has given her, in respect to interdicts; but that her possession is not civil, that is to say, it has not the *civil* effect, for it does not lead to usucapion. This possession, therefore, is natural, though distinct from the simple detention, which a *colonus* may well have. In order to understand the expression *possessio naturalis* in the law 1, § 9 and 10, above cited, in a different manner, it will be necessary to construe it to allow interdicts to the mere detainer, and also to the *colonus*, to whom, however, the same law expressly refuses them.

The creditor, who receives an object in pledge (*creditor pignoratitius*), is considered as the possessor, but not as the

¹ The law 46, D. 24, 1, *Inter virum et uxorem nec possessionis ulla donatio est*, is not opposed to this system; it says, that the wife does not possess *pro donato*, but *pro possessore*; l. 16, D. h. t.

civil possessor; he possesses in all respects except that of usucapion. This results from the law 3, § 15, D. 10, 4, in connection with the law 10, D. 41, 3.¹

Other arguments, mentioned by Savigny, further confirm the explanation, already given of these modes of speaking, consecrated in the language of the Roman law. As they are less conclusive than the preceding, we shall pass them over in silence. It is important to observe, however, that the expression *jure civili* (or *civiliter*) *non possidere* has also another meaning; it indicates, that some one, for instance a slave, can never be considered as the possessor, in virtue of the civil law.²

Possession properly so called, that is to say, that possession of which the prætor guaranties the enjoyment, never receives the qualification of *possessio civilis*. It differs, however, from simple detention or natural possession: in the language of the laws, the latter is designated by the following synonymous expressions, *naturaliter possidere, corporaliter possidere, tenere, in possessione esse*³; whilst the words *possidere, possessio*, are employed to designate the true pos-

¹ The word *denique*, in the law 3, § 15, means: *thus, for example*, as in the laws 87, D. 50, 17; 13 D. 1, 7, and elsewhere. Savigny, pp. 51, 52.

² L. 24, D., h. t.; l. 38, §§ 7, 8, D. 45, 1; l. 7, §§ 1, 2, D. 10, 4.

³ L. 10, § 1, D. h. t.; l. 7, pr. D. 39, 2; l. 49, § 1, D. h. t.; l. 3, § 3, and l. 24, D. *ib.* "*Idem Pomponius bellissime tentat dicere, numquid qui conduxerit quidem prædium, præcario autem rogavit, non ut possideret, sed ut in possessione esset? Est autem longe diversum: aliud est enim possidere, longe aliud in possessionem esse.*" L. 10, § 1, de Poss.

"*Eum cui ita non cavebitur, in possessionem ejus rei. . . ire, et, cum justa causa esse videbitur, etiam possidere jubebo.*" L. 7, pr., de Damno infecto.

"*Qui in aliena potestate sunt, rem peculiarem tenere possunt, habere, possidere non possunt: quia possessio non tantum corporis, sed et juris est.*" L. 49, § 1, de Poss.

"*Neratius et Proculus et solo animo non posse nos adquirere possessionem, si non antecedit naturalis possessio.*" L. 3, § 3, de Poss.

"*Quod ex justa causa corporaliter a servo tenetur . . . dominus creditur possidere.*" L. 24, de Poss.

session, and to distinguish it from the preceding, which is not guarantied by interdicts.¹

This last distinction is clearly established in the law 9, D. 6, 1.²

In conclusion, the result of Savigny's researches is, that, as civil possession exists only by the concurrence of certain conditions, there is, properly speaking, but a single kind of possession, in jurisprudence; and this agrees with the law 3, § 21, D. h. t. : *In summa magis unum est genus possidendi*. The *species infinitæ* are only *diversæ et infinitæ causæ possidendi*.³

The phrase, *naturaliter possidere*, being susceptible of two different senses, the whole of the passage, in which it occurs, must determine the true signification of it.⁴

The objections, which may be urged against the meaning given by our author to the words *civiliter possidere*, do not escape our attention, but they appear easy to be removed.

It may be said, in opposition to Savigny, that it is not sufficient to demonstrate the possibility or even the probability, that, by the words *civiliter possidere*, we are to understand the faculty of usucapion (*ad usucapionem possidere*); that the only solid basis for his system is the certainty, that such is the true meaning of those expressions; and that this certainty does not exist; the law 3, § 15, D. 10, 4, upon which the author relies, is obscure; the arguments, which

¹ L. 1, § 23, D. 43, 16; l. 3, § 8, D. 43, 17; l. 7, D. 43, 26; §§ 4, 5, 6, l. 4, 15.

² "*Officium autem judicis in hac actione in hoc erit, ut judex inspiciat an reus possideat. . . . Quidam tamen, ut Pegasus, eam solam possessionem putaverunt hanc actionem complecti, quæ locum habet in interdicto uti possidetis, vel utrobi. Denique, ait, ab eo, apud quem deposita est, vel commodata, vel qui conduxerit, aut qui legatorum servandorum causa, vel dotis, ventrisve nomine in possessione esset, vel cui damni infecti non cavebatur, quia hi omnes non possident, vindicari non posse. Puto autem, ab omnibus, qui tenent, et habent restituendi facultatem, peti posse.*" L. 9 D., de Rei vind., 6, 1.

³ Savigny, pp. 62, 63.

⁴ Savigny, pp. 71, 72.

he draws from it, are not very conclusive; and it is to no purpose, that he establishes, in support of his opinion, that the possession of a thing, given by the husband to his wife, does not receive in the laws the title of civil possession; for, it is not demonstrated, that this is so because the right of usucapion is refused to the wife; the reason may well be, because the civil law prohibits such a donation, in the same manner, that it refuses to acknowledge possession in a slave. It may also be objected, that, in order to make good the consequences of his system, Savigny is forced to bring together and combine texts, the connection and relation of which are frequently very doubtful, which greatly weakens his demonstration; that the law 2, § 1, D. 41, 5, the only passage, in which the expressions *possessio civilis*, *possessio naturalis*, are used in direct opposition, distinguishes only two kinds of possession, and is invincibly opposed to every system, which makes it necessary to admit a third kind, of which no fragment in the Corpus Juris makes express mention.

But these objections, it seems to us, may be easily overthrown. In the first place, the triple distinction of Savigny is the only means of resolving the contradictions, which the texts present upon the hypothesis of any other interpretation. His system is supported by analogy and the strongest probability. The passages, relative to the possession of an object given by the husband to his wife, lead necessarily to the proposed distinction; since a possession, acquired against the prohibition of the laws, is nevertheless considered as a legal possession; the *prædo* even is entitled to interdicts, and it is only in regard to usucapion, that his possession ceases to have an effect, that is to say, to be civil. The law 2, § 1, D. 41, 5, which lays down the rules concerning the possession necessary to usucapion (*possessio civilis*), only puts in opposition to this possession some examples of the *possessio naturalis*, after making the observation, that one

cannot change his title into a title *pro herede*, in any possession.¹ Finally, if we consider the manner, in which the Pandects were composed, by the union of a great number of fragments dispersed in the writings of the ancient juriconsults, we shall be sensible how very probable it is, that some of the distinctions made in the original works have been omitted; and, certainly, these omissions do not prove any thing against the existence of a division, which the laws taken together concur to demonstrate and establish.

The developement of this important point is followed, in the work which is the subject of this analysis, by a definition of what the laws call *juste et injuste possidere*, *bona et mala fide possidere*. But these distinctions have no influence upon the abstract notion of possession properly so called;² and the first is not even applicable to the true possession; for, *juste possidet, qui sine vitio*, i. e., *nec clam, nec vi, nec precario possidet, sive possideat, sive naturaliter tantum possideat rem*; *injuste, qui vi, clam aut precario possidet*.³

The definition of possession must therefore be reduced to the following:

Every possession is the detention of a thing, of which we have the physical possibility of disposing (*factum possessionis*); but, in order to be considered as the possessor properly so called, we must add to this detention the will to enjoy or dispose of the thing at our pleasure, or, in other words, the will to be the master of it (*animus possidendi*).⁴ The union of these two conditions constitutes the true possession; and, it is of little importance, whether the possessor

¹ The true *pro herede usucapio* is known to us only by the Institutes of Gaius.

² In *summa possessionis non multum interest juste quis an injuste possideat*. L. 3, § 5, de Poss.

³ Savigny, § 8.

⁴ L. 3, § 1, D. h. t.

believes himself to have or not to have the right to retain the object possessed.

But we may have other rights in a thing than the right of domain ; and we may, in virtue of some of these rights, detain the thing. Savigny examines the question, whether one, who has an intention to retain a thing, which he is allowed to hold in virtue of some right other than the right of property, can, in certain cases, be regarded as the possessor ? He considers the nature of the legal effects (or rights) which are designated in the Roman jurisprudence, by the following expressions : 1. *In bonis habere* ; 2. *Possessio prædiorum provincialium*, or *bona tributaria et stipendiaria* ; 3. *Servitutes et ususfructus* ; 4. *Emphyteusis et ager vectigalis* ; 5. *Jus pignoris* ; 6. *Superficies*. It results, from an examination of these different rights, that, in the first two cases, the detainers are considered as true possessors, because their rights, different under almost all relations, are nevertheless assimilated to that of *domain* ; in the other cases, they remain mere detainers, because they have no right, except in relation to the thing of another, even in the cases of the emphyteusis and pledge ; for they only manifest an intention to have a thing, belonging to another, and not an intention to treat the thing as their own. This rule, however, admits of some exceptions, in particular cases (*singulari jure*).

This exposition, to which we shall have occasion to recur hereafter, and which establishes the nature of the *animus possidendi*, is continued in the second chapter of Savigny's work. The consequences, which flow from it, are very important, in relation to the acquisition of possession.

Two questions remain to be examined in this place, namely : What things are susceptible of being possessed ? and what persons are capable of having possession ? Reason, as well as the principles of every system of law, lead to the answer : that every person, capable of judgment and

will, may possess, and that all things, which he can subject to his control, fall into his possession. This doctrine is also sanctioned by the Roman laws. But this rule, like all other general rules, admits of exceptions: 1. In regard to things, which are withdrawn from the domain of man (things out of commerce); 2. In regard to persons, such as the sons of a family and slaves, who cannot be regarded as possessors, because they cannot have the property, and consequently are not considered, in the eye of the law, as having an intention to appropriate a thing. In these two cases, therefore, there can be nothing more than a mere detention, which the law does not protect, either by interdicts, or by the benefit of usucapion.

These exceptions to the general principle do not, in any respect, change the nature of possession. They are introduced in favor of public order, in reference to which, the general rules concerning private transactions are frequently modified.

The developement of the true nature of possession receives new light from the discussion of the famous question: *an plures eandem rem in solidum possidere possunt?* This question, to which, at the first view, it seems so natural to answer negatively, with Paul,¹ since the nature of things indicates clearly, that the same object cannot, at the same time, be possessed entirely and without reserve, by several persons, has nevertheless been the subject of long and obstinate controversies. The source of these discussions exists in the contradictory dispositions contained in the Pandects and Code. Some of the Roman jurisconsults held, that, in regard to certain effects only, it was possible to attribute to several persons the possession of the same thing at the same time, (*eandem rem duo in solidum possidere possunt, alius juste, alius injuste*). These jurisconsults, namely, Sabinus,

¹ L. 3, § 5, D. h. t.

Trebatius and Julianus, were of opinion, that one, from whom the object in his possession has been taken away, whether by violence or clandestinely, or who has lost the possession, because it has not been restored to him by the possessor in virtue of a precarious title, is nevertheless to be considered as the possessor, though another is equally in possession. The reasons for a system, which thus admits of a possession purely fictitious, are not very evident. This opinion was rejected by the other juriconsults, Paul, Celsus and Ulpian. But Justinian, or rather those persons, who, by his orders, compiled the Corpus Juris, inserted in it fragments of both these schools of juriconsults, so that we find there the traces of two contrary systems, without any decision by Justinian in favor either of the one or the other. Savigny thinks, that, in this state of things, we ought to follow the opinion of the juriconsult Paul; which seems to constitute the true legislation of the Digest, for the reason, that, in the fragments of his writings, which we find there, he not only mentions his own opinion, but also refutes that which is opposed to him.¹ Savigny explains the different passages, which might be cited against this opinion, in such a manner as to remove all contradiction.²

From this principle: *plures eandem rem in solidum possidere non possunt* (several persons cannot possess a thing solidarily, that is to say, at the same time entire and without

¹ L. 3, § 5, D. h. t. "*Plures eandem rem in solidum possidere non possunt. Contra naturam quippe est, ut cum ego aliquid teneam, tu quoque id tenere videaris. Sabinus tamen scribit, eum, qui precario dederit, et ipsum possidere, et eum, qui precario acceperit. Idem Trebatius probabat, existimans, posse alium juste, alium injuste possidere: duos injuste vel duos juste non posse: quem Labeo reprehendit: quoniam in summa possessionis non multum interest, juste quis an injuste possident, QUOD EST VERIUS: non magis enim eadem possessio apud duos esse potest, quam ut tu stare videaris in eo loco, in quo ego sto; vel in quo loco ego sedeo, tu sedere videaris.*"

² These interpretations being of great extent and difficult to abridge, the reader is referred to the work itself of Savigny, pp. 136-163.

reserve), it results: 1. That so long as an individual is the possessor of a thing, in the eye of the law, it is impossible that another should be considered as having acquired the possession of the same thing; 2. That wherever a person is regarded as having acquired the possession of a thing, the anterior possessor must be regarded as having lost the possession.

These consequences will find their application in the sequel.

It may be demanded, too, (and this question is also made by Merenda and Cuperus): What reasons induced the Roman jurisconsults, to separate the possession from the property and other rights, and to consider it as a distinct right? Savigny, adopting the ideas of Niebuhr,¹ shows how the Romans, in early times, distinguished the possession from the property. When the patricians had the gratuitous enjoyment (the possession) of the domains of the state, they distinguished this right from the property of immovables: the latter was denominated *mancipium*, and was guaranteed by actions; the possession was maintained only by interdicts. The possession of immovables, belonging to private persons, had the same advantages conferred upon it, at a later period.

This opinion is confirmed by a great number of passages in Livy, Festus, Cicero, and other classic authors; and it alone explains, in a satisfactory manner, the origin of *interdicts*.²

§ II. Of the Acquisition of Possession.

Possession properly so called, according to the analysis above given, is composed of two elements, viz.: the physical detention of a corporeal object, and the will of the detainer to have this object as his property. According to this simple

¹ Roman History, vol. ii. p. 360.

² Savigny, pp. 172-182.

and natural theory, it is manifest, that but few difficulties can arise, in regard to the manner of acquiring possession ; it is simply requisite, that these two conditions should concur. The acquisition of possession, therefore, takes place, whenever, and from the moment, that to the apprehension¹ of the object, we unite the will to dispose of it as property.²

In order to develop this principle, it is necessary to inquire :

1. In what cases, and how, the apprehension of a thing takes place ;
2. When an individual may be said to have the will to dispose of a thing, which he has apprehended, as the proprietor thereof ; and
3. Whether, and in what manner, one may acquire the possession, by the agency of a third person.

I. OF APPREHENSION.

Though nothing is more simple, apparently, than to determine wherein consists the material fact of the apprehension of a thing, this is nevertheless the point, in relation to which, the interpreters, who have treated of possession, have fallen into the greatest number of errors. They all teach that apprehension is the real and physical seizure of the thing, since, by this seizure alone, can we have the faculty of disposing of it at our pleasure. The numerous cases, in which the Roman law acknowledges a detention, without the occurrence of this real seizure, are regarded by the interpreters as particular cases, in which the detention is admitted only in virtue of a fiction, rendered necessary by considerations of public utility ; and, the acts, which consti-

¹ We shall make use of this word to express the act, by which one becomes the detainer of a thing, though this is not its ordinary acceptation. It would have been difficult to find a more proper expression.

² Paul, *Rec. sent.*, v. 2, § 1 ; l. 3, § 1, D., h. t. *Acquiritur possessio CORPORE simul et ANIMO, neque per se CORPORE, neque per se ANIMO.*

tute this fictive apprehension, are considered as the symbols of a real seizure. The obscure theory of delivery, which is commonly received, and those ridiculous distinctions of the *traditio longæ manus*, *traditio brevis manus*, *traditio ficta*, &c. are all derived from this error.¹

A sound interpretation of the texts of the law, relative to this matter, proves how very remote the common doctrine is, from the principle followed by the ancient juriconsults, whose decisions alone, however, compose this part of the Roman law.

Besides, the folly and absurdity of the results, to which this doctrine necessarily leads, sufficiently demonstrate its incorrectness. How, in fact, can it be maintained, that the greater number of the modes of acquiring possession operate only in virtue of a legal fiction, when it would follow from thence, that, in a matter in which analogy alone can furnish means for deciding the contestations, resulting from ever-varying combinations of facts, which it is impossible to foresee, we should be entirely deprived of this resource, inasmuch as fictions ought not to be extended from one case to another; and we should consequently be abandoned without a guide, in the midst of an inextricable labyrinth.

It is impossible, that the Roman juriconsults, in their decisions relative to detention, should have always been governed by positive laws, which had foreseen all the cases proposed to them: they must have been directed by more general principles, than could have received the sanction of the legislators of a growing people. Neither is it to be supposed, as almost all the interpreters before Savigny have done, that the juriconsults introduced fictions by their own authority. On the contrary, all the ancient Roman law affords proof, that the acts, treated as symbolical by these

¹ Donellus himself admits these divisions, already taught by the glossators. Savigny, p. 186.

same interpreters, never had that character; and there is not a single text in relation to this matter, which gives the least ground to suspect the admission of a symbol or a fiction.

If, without any preconceived notions on the subject, we make the inquiry:—when an individual ought to be considered as having acquired the detention of a thing?—the nature itself of the fact of detention will lead to this answer, viz.:—whenever he has, by any act whatsoever, acquired the power of disposing of the thing at his pleasure. All will agree too in saying, that one may be in contact with an object, without thereby acquiring the detention of it, as, for example, a waterman does not possess the water, which he touches with his oars.

These simple and natural notions are those of the Roman juriconsults; and, it is in following them, that they have given us those numerous decisions, the reasons of which have for so long a period been misunderstood. We perceive throughout, that they recognise the detention of an object, whenever there exists the possibility of disposing of it, no matter by what act one acquires that power. This doctrine is declared in express terms, by the law 1. § 21, D. h. t.,¹ and it is impossible to withhold our surprise, that a text so clear should have been incorrectly interpreted by the commentators.

In order to remove all doubt, that such is the doctrine of the Roman juriconsults, let us examine their most remarkable decisions, in relation to this matter.

In the first place, let us examine those which concern immovables, and which relate equally to cases, in which the possessor delivers the object to another, and also to those in which the object is seized, without the consent of the actual possessor.

¹ *Non est enim corpore et tactu* (this and not *actu* is the true reading; Savigny, p. 192, n. 1.), *necesse apprehendere possessionem, sed etiam oculis et affectu; exemplo esse eas res, quæ propter magnitudinem moveri non possunt.*

1. A wife, who wishes to give a portion of her immovable property to her husband, declares in his presence, and upon the land itself, that she makes a cession of it to him. The husband commences to possess it from that time.¹

2. In order to possess a piece of ground, the law 3, § 1, D. h. t., declares, that it is sufficient to go upon the land, with an intention to will to be the master of it.

3. The possession may even be acquired, says another passage,² without entering upon the land; if the possessor, in view of or near the land, resigns his possession to another individual, the latter thereby becomes the possessor.

What is the common and sole principle upon which these decisions are founded? It is, that he, who wills to acquire the possession of an object, has the object in his power; the only impediment which existed, namely, the possession of another, being removed, he is able freely to dispose of the ground in question.

4. We read in the fragment 52, § 3, D. h. t., that the occupation of a piece of ground by an individual, who prevents the ancient possessor from re-entering, gives to such occupant the possession, which he causes the other to lose; and, in this case, the acquisition of possession takes place, less by the occupation of the ground, than by the resistance opposed to the first possessor.

From these texts it results, that the apprehension of an immovable takes place, whenever we dispose of it, or whenever we are in a situation to dispose of it. It is not necessary, that we should really touch the piece of ground; and it would be ridiculous to require such an act, which certainly would not give us any more power over the object, than we should have without it, in the cases mentioned in the above cited laws.

¹ L. 77, D. 6, 1. Savigny, p. 193.

² L. 18, § 2, D. h. t.

The apprehension of movable things must be considered under the same point of view. There are some things, without doubt, which we possess, because we hold them in our hands; as, for instance, a piece of money, which one gives us: but there are others, of which no person would contest the possession, though we should not as yet have touched them in any manner. We shall find, in this respect, in the Roman law, the following examples:

1. The marks, which I make upon pieces of timber, with the consent of him, who wills to give me the possession of them, constitute an apprehension of possession on my part.¹

2. The bag of money, which one puts under my eyes, declaring at the same time, that he gives it to me, becomes, by that act alone, within my detention.²

3. The same effect is attached to the declaration, that one transmits to me the possession of certain objects, such as bales, boxes, &c. when these things are under my eyes.³

4. The execution of an order, to remit an object to some one for me, confers the possession of the object upon me.⁴

In regard to movables, therefore, apprehension takes place by our presence near an object, accompanied by an act, which renders us the master of it. This act is necessary, for one may be very near a thing, without being able to dispose of it; as, for example, a hunter cannot dispose of the game, which he is pursuing, even though he has wounded it; for, says the law 5, § 1, D. 41, 1, *multa accidere possunt, ut eam (bestiam) non capiam*.

Among the examples of apprehension which the texts present, we find also the case, in which one delivers to us

¹ L. 14, § 1, D. 18, 5; L. 1, C. 8, 54.

² L. 79, D. 46, 3; Savigny, p. 199.

³ L. 1, § 21, D. h. t.; l. 51, D. h. t. 39, 5. *Etiam si amphoræ corpore apprehensæ non sint, nihilominus traditæ videntur; animi quodam genere possessio erit æstimanda.* Savigny, p. 201.

⁴ L. 1, § 21, D. h. t.

the keys of a building, which contains the things, of which we wish to acquire the possession ;—this delivery confers upon us the possession. The interpreters have always regarded this delivery of the keys as a symbol of the delivery of the objects themselves ; and this example is every where cited, in order to give an idea of the symbolical delivery. But a very natural reflection seems to have escaped the attention of these authors, namely, that he, who has the keys of a house, or chest, &c. may, if he is near such house or chest, dispose of the objects which they contain ; and, it is in this last case, that the Roman jurisconsults regard a delivery of the keys as equivalent to a real delivery of the objects.¹ There is, therefore, no need of having recourse to a fiction, or to a symbolical delivery, in order to explain this decision.

It is not even necessary in all cases, to be near the things which we will to possess, in order to have the detention of them. Thus, though at a distance, we possess an object deposited in our house, where no person can come to take it from us ; in the same manner, also, we have the possession of a treasure, which we have concealed, even in the ground of another, so long as this possession is not ravished from us by the carrying away of the treasure.²

From all these examples, it evidently results, that the principle which directed the Roman jurisconsults in the solution of these questions, is not the necessity of a real contact of the person with the thing which he has the will to possess, or the existence of a fiction, which takes the place of such a contact ; but, on the contrary, their doctrine is,

¹ See l. 9, § 6, D. 41, 1 ; l. 1, § 21, D. h. t. ; l. 74, D. 18, 1. This last fragment says : *Clavibus traditis ita mercium in horreis conditarum possessio tradita videtur ; SI CLAVES APUD HORREA TRADITE SINT.* Savigny, pp. 207-211.

² L. 15, D. 10, 4 ; l. 44, pr., D. h. t. ; l. 3, § 3, D. ib. This last text, which presents some difficulties, is explained by Savigny, pp. 218-222.

that there is a detention, whenever one puts himself in a situation to dispose of an object at his pleasure, by doing, or concurring in the doing of an act, to which that effect must unavoidably be attributed. In order, therefore, to have the detention of a thing, it is sufficient to have the power of disposing of it, though we should not make use of that faculty; and it is this principle which leads Savigny to remark, that "detention must be regarded as the physical and immediate possibility of disposing freely of a thing, that is to say, of making that use of it which comports with its nature." The possession lasts as long as we preserve this faculty.

II. OF THE WILL TO DISPOSE OF A THING AS OWNER (*animus possidendi*).

In order to constitute Possession properly so called, it is necessary, that, to the apprehension or detention of a thing, should be joined an intention to have it to one's self, to make it one's own property. This will alone gives to the detention the character of a true possession, as has already been shown. It is not necessary that this detention should be accompanied by an opinion, that we have a right to detain the thing.

It has already been observed, that, according to the principles of the Roman law, the *animus possidendi* is in general considered as the *animus dominii*; yet, in some cases, an *animus possidendi* is admitted, though it is certain, that there is no will to have the thing in property. But these cases are only particular exceptions; and it may be laid down as a principle, that every detainer of a thing, who uses it as the thing of another, without pretending to any right in it, has not, properly speaking, the possession of that thing.

Nevertheless, in order the better to establish the nature of the *animus possidendi*, the author examines, independently of the ancient law, the different cases, in which an individual detains the thing of another, with a different intention

from that of disposing of it as an owner. He divides these cases¹ into three classes.

First class. When an individual, though detaining the thing of another, with the intention to detain it as such, is nevertheless considered, under some relations, as the possessor, in consequence of the nature of the right which he exercises in regard to that thing. This happens: 1. In the case of the emphyteutic farmer;² 2. In the case of a creditor, who, by contract, has received a thing in pledge, *creditor pignoratitius*.³

In these two cases, the edict of the prætor gave to the person of the detainer, in case of a disturbance of his possession, the ordinary interdicts, and these same interdicts are expressly refused to the debtor, in the case of the contract of pledge, though he continues to be regarded as the possessor relatively to prescription.⁴

The *second* class is composed of cases in which the detention of the thing of another may, but does not necessarily, produce the effects of possession, properly so called, such as: 1. The case of a deposit; 2. The case of a *precarium*.

The depositary is not ordinarily any thing more than the mere detainer of the thing deposited;⁵ but if the property of the thing is in litigation, and, for that reason, is put in sequestration, it may be agreed for the benefit of the litigating parties, that the possession shall be attributed to the depositary, at least under these two relations, namely: 1. That neither of the parties shall act as the possessor, before the

¹ P. 279.

² L. 15, § 1, D. 2, 8.

³ Where a creditor was put in possession by a decree of the prætor, he was entitled to a particular interdict. L. 26, D. 13, 7; l. 12, D. 41, 4.

⁴ L. 16, D. h. t. *Qui pignori dedit ad usucapionem tantum possidet; quod ad reliquas causas omnes pertinet, qui accepit possidet.* See, also, l. 37, D. 13, 7; l. 23, pr., D. 20, 1; l. 29, D. 13, 7; l. 36, D. h. t. Savigny, pp. 291-301.

⁵ L. 3, § 20, D. h. t.

decision of the process ; and 2. That the depositary shall be entitled to interdicts.¹

In the *precarium*, he who receives the thing is considered as entitled to the interdicts, *quia possidere rogat* ;² unless it is agreed that he shall be only a simple detainer or natural possessor.³

Lastly, the *third* class includes those cases, in which the detainer of the thing does not obtain any of the privileges of the true possession. Under this head are comprised : 1. The usufructuary ;⁴ 2. The locatary ; 3. The commodatary ; 4. He to whom one has given a mandate to detain the thing ; 5. He who is put into possession by the Prætor (*missus in possessionem*) ; and 6. Those who have only a right of servitude or *superficies*.⁵

Two points of great interest remain to be examined, namely : what persons may have the will to possess ; and, in regard to what things this will may exist : but the length of the developments, which this discussion would require, compels us to omit them, and to refer the reader to the work itself, where he will find them treated in a masterly manner.⁶

III. ACQUISITION OF POSSESSION BY ANOTHER.

Is it possible to acquire possession by a third person, and, if so, what are the means, whereby to make such acquisition ?

At the first view, it would seem, that such an acquisition is impossible, and that we do not have the possession which

¹ L. 39, D. ib. ; l. 17, § 1, D. 16, 3. Savigny, pp. 303-306.

² L. 4, § 1, D. 43, 26.

³ L. 10, pr., et § 1, D. h. t. Savigny, p. 306.

⁴ In the usufruct, there is, indeed, a *juris quasi-possessio*, but, in regard to the thing itself, there is nothing more than a simple detention or *natural possession*.

⁵ Savigny, pp. 279-293.

⁶ §§ 21 and 22.

another acquires, even when he makes this acquisition for us. But a more profound examination makes it clear, that, from the moment when another possesses for us, we have the possibility of disposing of the thing which he detains, at our pleasure; the only impediment which we could encounter would be the will of the detainer; and, in the case supposed, this will being subjected to ours, the impediment ceases, and we are then in the situation of one who possesses in his own person.

We proceed now to an examination of the means of acquiring possession by another; and, to this end, three things are requisite:

1. In the acquirer, the will to possess, and the resolution to acquire the possession by another; this is the true meaning of the principle, that, one cannot acquire the possession without knowing it: *ignorantibus possessio non acquiritur*.

2. In the person, by whom the possession is to be acquired, the fact of apprehension; and, with this fact, the intention to acquire for another (*animus alieno nomine possidendi*); for, without this, he who apprehends, would himself become the possessor. It is in this sense, that Paul¹ says: *possessionem acquirimus animo et corpore; animo utique nostro, corpore vel nostro vel ALIENO*.

3. There must also be a legal relation, existing between him who wills to acquire the possession by another, and such third person. This relation may be: 1. A legal power of the former over the latter, such, for instance, as the power of the master over his slave, or of the father over a son not emancipated;² or 2. The result of an agreement (*per liberam personam*).

¹ Rec. Sent. lib. v. tit. 2, § 1.

² In the same manner, one might anciently acquire by the son of a family, by him who was in *mancipio* (for so was denominated the power over free persons bought by mancipation), and by a woman in *manu*. The son of a family does not acquire for his father, according to the new law, except in

In regard to the first case, we remark, that not only the proprietor, but also the possessor in good faith, and the usufructuary, become possessors by the interposition of a slave, of whom they have the ownership, the possession, or the usufruct.¹

In virtue of an agreement, one becomes the possessor by means of a mandatory. The faculty to acquire in this manner was not always admitted in the Roman law; and it might be concluded, from several passages in Gaius, that, in his time, this acquisition was still contested. The Institutes of Justinian inform us,² that Septimius Severus only modified this principle:—*per liberam personam non acquiritur*,—in regard to possession and the rights which result therefrom.³

This modification is also quite natural, because possession being rather of fact than of law, from the moment when a third person apprehends a thing for us and with our consent, we begin to possess it even before we have knowledge of the apprehension, the thing being then at our disposition. Under this relation and for this case, we follow a principle (*etiam ignorantibus nobis possessio acquiritur*),⁴ which seems to be at variance with one which we have previously laid down.

If he, who manages our affairs without a mandate, apprehends a thing for us, the possession is acquired to us only from the moment when we begin to have a knowledge of this fact, and to will to take advantage of it.⁵

two cases, namely: 1. when he has an intention to acquire for the father; and 2. when he acquires for the *peculium*, denominated *profectitium*. See Savigny, pp. 313-318.

¹ These acquisitions are remarkably well explained in Gaius LII. §§ 86-94.

² II., t. 9, § 1.

³ L. 51, D. h. t.; l. 13, pr., D. 41, 1; l. 41, D. 41, 3; l. 1, C. h. t.; Savigny, p. 324.

⁴ § 5, Inst. loco cit.

⁵ L. 42, § 1, D. h. t.; Paul, Sent., 5, 2, § 2.

One application of the rule, that the possession may be acquired by others, is the act denominated *constitutum possessorium*, by which, a person, who possessed for himself, agrees to cede his possession to us, and from thence to preserve the detention in our name. This agreement frequently takes place tacitly, as is shown by several passages of the *Corpus Juris*.¹

L. S. C.

[To be concluded in the next number.]

ART. III.—ON THE LEGAL PROFESSION IN NEW ENGLAND.

Parts of an Address, delivered by EMORY WASHBURN, Esq., before the Bar of the county of Worcester, Mass., October 3, 1836, on the occasion of the dissolving of their association.

I HAVE said, that this occasion is interesting in its associations and its consequences, and I propose to illustrate, so far as my limited means will permit, the importance, I had almost said, the indispensable necessity, of an independent bar, in the faithful and independent administration of justice by our courts of law, by referring for my facts to the history of our own judicial establishments. I might do more; for the same history would show, that the personal rights and liberties of the people depend upon a proper union and balance of influence of an honest and intelligent jury, an independent, upright and enlightened bench, and an honorable, learned and responsible bar; and that all these should be sustained, as ministers in the temple of justice, before

¹ See l. 18, pr., D. h. t.; l. 48 and l. 77, D. 6, 1; l. 1, § 1, and l. 2, D. 17, 2. Savigny, pp. 326-338.

whose altars the demagogue should be dumb, and political corruption should hide its head.

My subject therefore is the bar,—the profession which we have chosen,—as the means of an honest livelihood, and of honorable usefulness and distinction.

The necessity of having a body of men, whose peculiar business and study it must be to understand, elucidate and enforce the principles of law, and to stand as the organs of communication between the suitor, whose employments and pursuits unfit him to be his own advocate, and the tribunal at which he seeks protection or redress, must be obvious to any one upon a moment's reflection. Indeed, in every civilized state, such a class of men has been found ; nor is it too much to say, that, without such a class, no state can long hope to sustain its institutions of justice in any thing like purity.

It furnishes a natural division of mental labor, which is rendered necessary by the multiplied relations, duties and obligations, which arise in a social state, and must constantly be the subjects of nice and often artificial and intricate rules of government, requiring in their investigation the exercise of deep learning, refined moral culture, and high mental discipline. The more refined society becomes, the more its relations are involved and its interests multiplied, the more necessary is it that a class of men should be formed, whose learning and intellectual cultivation fit them to understand and explain the laws, which bind together the elements of that society, and to aid their deliberations, to whom is entrusted, in the last resort, to judge between man and man, or to pass between the citizen and the state.

If judges are to be selected from among those, who are familiar with the forms of justice, it needs no argument to prove, that they, from among whom this selection is to be made, should be learned as well as practical men. And if their selection is to be made, by popular favor or executive

partiality, from the common business walks of life, it certainly can be no less important, that to the good sense and moral integrity of the upright judge, should be added the learning and sagacity of the experienced lawyer, lest our jurisprudence should become a mere succession of individual and inconsistent adjudications between party and party, instead of a generous, homogeneous system, whose rules should be a safe guide to the inquirer in pursuing the ends of justice.

But who does not know, at this day, that the science of the law is not to be attained, amidst the cares and ordinary business pursuits of life? I mean the law, as it in fact is, a liberal, noble science, embracing a system of ethics, as wide as the duties between man and man; regulating and controlling every relation in life, from the affairs of the domestic circle, to that of the great family of nations; fixing and defining the rules, by which private property is held and personal liberty secured, while it gives energy and effect to the power of a nation's will. Who does not know, that a science as broad, as ramified, and as important in its influences, as this, must require days of toil and nights of patient labor, to learn even its rudiments; and, who, when he has consumed the "viginti annos" of deep study, has not felt that he had but just entered that wide and boundless field, from which those principles of jurisprudence are drawn, which regulate the social and political state of man?

Notwithstanding considerations like these, so obvious to the least reflection, it has been a favorite theory with many, that the law might be easily written out into a moderate compass, where every man might become his own lawyer, and the streams of justice be rendered pure and unclouded.

Let such men, if honest, dream on, for we would not break their harmless delusion. But, to the political reformer, who knows what he utters is untrue, and seeks no higher purpose than his own aggrandizement, we would extend no such indulgence.

It can never be a question, whether we shall have lawyers or not, for lawyers and judges we shall have, till we cease to be governed by laws. It is rather whether we shall have an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers, with here and there one, who, by his learning and skill exerts an undue because an unequal influence, to manage the affairs of our courts, and sustain, if at all, the supremacy of the laws, against the growing spirit of misrule.

I have proposed to draw illustrations from the history of our own jurisprudence, but, before entering that field we ought to remember that a system of rules, which might have been tolerated, and even adequate to the public wants, in a state of society like that among the puritans and their immediate descendants, could never answer the demands of a state so artificial, not to say corrupt, as that which exists here now. The rev. Mr. Cotton, with the "simple cobbler of Agawam," might have been competent to frame a "body of liberties" for the colony in 1639, but the system of legislation, which has grown up during the two succeeding centuries, has become a body, whose parts and relations neither clergy nor laity can easily analyze or explain.

The judicial system under the colony, if indeed that could be called a system, which fluctuated with every change in the popular will, was at first extremely simple, and the administration of justice under it equally summary and popular. For a while, the people in their general court had the ultimate control over judicial as well as legislative matters. The administration was a pure democracy. The freemen met *en masse* and decided all questions of law, as well as legislation, by majorities. Those who made also construed and administered the laws; and, under this union of legislative, judicial and executive functions, we can look for but little order or system, especially in the mode of administering justice. By an improvement

upon their original system, the assistants, it is true, held courts of justice and adopted a somewhat regular form of proceeding. But, both before and after the delegation of judicial powers to the board of assistants, the judgments of the colonial courts, of which we have authentic records, strike us with surprise, while they illustrate the lawless manner in which the laws were construed and justice was administered.

Thus, in 1631, Philip Radcliff was whipped, cropped and banished, for reproaching the government and the church at Salem; and, in the same year, for some offence, the court ordered the house of Thomas Graves to be torn down, and that no Englishman should presume to give him entertainment afterwards.

The democratic form of government in the colony was modified in 1634, by substituting delegates or "deputies" from the several towns, to form the popular branch, in the place of the freemen themselves; but it was not till 1639, that the erection of the assistants into a court of justice, to which I have referred, took place; and this was done at the establishment of that system of courts of justice, which continued substantially the same until the dissolution of the first charter.

The first of these courts in importance was the "general court," to which appeals lay in certain cases, and in which justice was sometimes administered in answer to petitions. The "court of assistants" was the next in dignity, and to this appeals lay from the "county courts," which were held by the magistrates resident in the several counties, or by persons specially chosen for the purpose. The county courts were the parents of our courts of common pleas and sessions, and moreover held jurisdiction in matters of probate. There were also justices' and commissioners' courts of an inferior grade, besides courts peculiar to the colony, such as strangers' or merchants' courts, in which summary jus-

tice was administered, in favor of those who were about to depart from the colony, a military court, with very extensive powers, which had charge of the military affairs of the colony, and a court of chancery consisting of magistrates, chosen by the freemen of the several counties.

Juries were employed in the trials of causes, as early, certainly, as 1633, and their powers seem to have been almost commensurate with the unlimited jurisdiction of the courts. We have it from a cotemporary, that "matters of debt, trespass and upon the case, and equity, yea, and of heresie also were tryed by jury." But in these trials, they were at liberty to find as much as they could, if they could not find the "main issue;" and, where they were not clear in their judgments, they were at liberty to advise with any man they should think fit, provided, it was done in open court. In their verdicts, they often returned, that there was ground "to suspect" the defendant, and the court would thereupon inflict such punishment upon him, as in their discretion was thought proper, though they did not confine these punishments to the offences, with which the prisoners were charged.

Regularity in their course of proceedings could not reasonably be looked for in such courts. After 1639, it is true, they were required to keep records of their doings, but they exhibit a singular medley of theocratical and democratical adjudications, with which the history of no other people can furnish a parallel.

Attorneys at law there were none, for many years after the settlement of the colony. One unfortunate wight of the name of Lechford came here from London in 1637; but, having been caught "pleading with the jury out of court," he was debarred from pleading in court any more, although he acknowledged that he had "overshot himself;" and, although he even promised to meddle no more with controversies, he found himself so uncomfortable in the colony,

that he returned to England in 1641, and sought his revenge by publishing a work about his New England neighbors, which he called "Plain Dealing."

Partly because of the estimation, in which they were held, and partly because the general court was an appellate tribunal in some cases, an ordinance was passed in 1663 excluding "usual and common attorneys" from a seat in the general court.

It was not however from the want of a knowledge of even the technical rules of law, on the part of many of the leading magistrates, that the judicial proceedings of the colony took the form they did. It was, that those, who were thus familiar with the administration of justice, were themselves the magistrates; and, being uncontrolled by the vigilance of learned counsel, they wielded their learning to promote their own peculiar views. Winthrop, Humfrey, Bellingham, and probably Pelham and Bradstreet, had been educated lawyers at home; and, when we remember, that they lived after the days of Coke and Bridgman and Guilford, and were contemporaries with Bacon and sir Matthew Hale, we may well feel surprise, to read their discussions as magistrates and judges. But the explanation is, that the judges were of and from the people, and eligible by the people from year to year.

Suitors moreover managed their own causes, or employed the aid of irresponsible and un-fed patrons; and scorning the round-about way of reaching justice through the "labyrinths of the law," went straight to their judges out of doors, to tell their own stories and win a favorable judgment from the man, before he promulgated his wise opinions as a judge. So gross and common had this evil of *ex parte* hearings in private in judicial matters become, even in 1641, that it was made the subject of an election sermon, delivered that year, by the rev. Mr. Ward; and, when in consequence of that sermon, an attempt was made to pass a law prohibiting

magistrates from holding such kind of intercourse with suitors, it was opposed upon the ground, that it would lead to the necessity of employing lawyers, to present the causes of parties before the courts !

The attorneys, who appeared in the courts, under the colony, were any thing but lawyers. Coggan was a trader, Richardson a tailor, Watson and Checkley were merchants, and Bullivant was an apothecary and physician ; and these were among those, whose names most frequently appear in the courts of the colony. Nor was there any occasion for any more learned practitioners than these. Before such courts, learning would have been wasted. In the simple forms of judicial proceedings, all that was wanting in an attorney was a good degree of self-confidence and fluency, and a reasonable stock of shrewdness or mother-wit, to enable him to manage with success the causes of his clients. The popular voice, too, especially when allied with that of the clergy, was irresistible as well in matters of religious faith, as of legal administration. When in 1655, upon the trial of Anne Hibbins for witchcraft, the jury found her guilty, and the magistrates, who tried her, refused to accept the verdict, the popular clamor prevailed, and she was condemned and executed, by the order of the general court.

A peculiar trait, in the early administration of justice in the colony, was the clerical character of the laws, the offences tried, and the punishments inflicted. The clergy, in fact, held, for years, a predominating sway over every thing in the colony ; and up to 1682 scarce a measure of any importance was taken by the legislature, without obtaining the approbation of the leading ministers. Their judicial affairs consequently went on as might naturally have been expected. The aim of the magistrate and the juror, when honest, was to reach justice between parties ; but, in doing so, precedents were violated, forms were discarded, and conclusions arrived at, they scarcely knew how. Admiralty

causes were tried by jury; actions on the case were brought for the recovery of lands; Samuel Allen, of Northampton, sued John Bliss of the same town, "for unjustly stealing away the affections of Hannah Woodford, his espoused wife, damnifying the said Samuel, to the value of fifty pounds;" the wife of Thomas Oliver, of Salem, was punished, for slandering the elders of the church, by being made to wear a cleft stick upon the tongue for half an hour; William Hawes and John his son were presented, for deriding such as sing in the congregation, and also for charging the rev. Mr. Cobbet with falsehood in his doctrine, for which they were fined and compelled to make a humble confession at Lynn at a public meeting. Other instances of summary justice, almost without number, might be collected, which serve to illustrate that extreme of "judge law" of which we hear such frequent complaints of late.

Our modern reformers are fond of referring to the times of the "pilgrim fathers," as worthy of all commendation, and of looking forward to a consummation, when the laws are to be "administered by men taken from among the body of the people themselves;" "when practical men are to have their share in the judicial offices of the state;" and "the tricks of law trade, the mystery, the jargon and the chicane of the craft," are to be wholly unknown.

I hope I may therefore be pardoned, for borrowing a few more examples by the way of illustration, from the judicial history of these same "pilgrim fathers," and "the practical men" who constituted the "judicial officers of the state."

In 1645, Samuel Burnett was presented at the quarter court for saying in a scornful manner that he neither cared for the town of Lynn, nor any order the town could make. In 1652, Esther, the wife of Joseph Jenks, was presented for wearing silver lace; Robert Burgess for bad corn-grinding, and others for wearing great boots and silk hoods; Roger Scott was presented, "for common sleeping at the public

exercise upon the Lord's day, and for striking him that waked him," and in December following not having amended his conduct, he was sentenced by the court "to be severely whipped."

I might multiply illustrations of the state of the administration of justice under the people's judges, while the "law trade" was in effect suppressed, but I forbear. Enough has been said, to show that this talk about what our pilgrim fathers did, when applied to their judicial tribunals, is idle and unnecessary talk. They were wise men; they were wonderful men, we admit; but they were neither wise lawyers nor able judges. They followed the principles of the bloody code of Moses, rather than the dictates of an enlightened humanity; and, while we award to them no measured share of homage and admiration, it is in other spheres than the halls of justice, that we are to look for the qualities, that distinguished the fathers of New England.

It is true, they prospered and were happy under the first charter, with all its defects; and, for years after the change in their form of government, they looked back to this "good old charter," with veneration and heart-felt respect. Yet it is not saying too much, to assert that the laws and their administration, as they existed under and during the colonial government, would not be tolerated at this day, for a single month.

Their means of business were limited, and the relations of society were simple. Commerce required little regulation; lands were of little value; and complicated questions of title were few. Government itself, for a long time, assumed rather a patriarchal than a constitutional form; and, in that primitive state, though forms were dispensed with, this was done with a view of reaching summary justice. But it would not be tolerated now, save in those regions, where "judge law" is giving place to "lynch law," and the bloody edicts of a mob are superseding the so-much dreaded principles of the common law.

A change in the courts took place with the loss of the old charter. Dudley was made president, and a judicial system adopted. But it continued for a few months only; for, in December 1686, Andros arrived with a commission as governor of New England, over which he was to preside without any other legislative body than his own council.

Under his government, a superior court was organized with three judges; and something like order began to be given to their proceedings. But he was a contemptible tyrant himself, and contrived to infuse much of his own spirit into his judges, who were dependent on his will for the maintenance of their office. One of his creatures was attorney-general, and that office, for the first time, became a permanent one in the province. The number of lawyers here at that time was very small, and these were in the interest of the government; so that there was no one to stand between the people and the bench. Neither of the three judges were lawyers, but each had been educated for the ministry; and the manner, in which they administered justice, may be illustrated by a single case. Andros had ordered the town of Ipswich to assess a tax and pay the money into the treasury. The town doubted the right of the governor to levy taxes, without their being first granted by the representatives of the people; and, after calling a meeting of the inhabitants, it was voted, that they would not comply with the order. Upon this, the rev. Mr. Wise, their minister and five other persons were arrested and carried to Suffolk, out of their own county, to answer for the vote of the town. After a pretty long imprisonment, and being refused a writ of habeas corpus, which they applied for, they were brought to trial for "contempt and high misdemeanor." It was in vain, that the prisoners pleaded the provisions of the magna charta and the laws of Massachusetts, which protected them from such oppressive proceedings. One of the judges, in behalf of the court, told

them, that they must not think that the laws of England followed them to the ends of the earth; and concluded by assuring them, that they had no more privileges left, than to be sold as slaves. The trial proceeded, and the closing charge of the chief justice is so striking a specimen of what a bad judge may do, who has made up his own mind in a case, and wishes to carry a weak jury with him, that I venture to transcribe it; "I am glad there be so many worthy gentlemen of the jury, so capable to do the king's service, and we expect a good verdict from you, seeing the matter hath been so sufficiently proved against the criminals." The verdict was, almost of course, against the prisoners, who were fined, compelled to give sureties of the peace, and suspended from the civil offices which they held, as a punishment for what the government chose to consider an offence.

The revolution in 1689 put an end to this state of tyranny; and the old court of assistants was resumed, till 1692, when the provincial charter arrived here.

By this charter, the establishment of courts of justice was given to the general court, while the appointment of the judges was with the governor and council; and it is a fact, which we ought not to omit, that the first court under the charter was created without law, and acted as much without authority, as they acted against justice and common sense. The court to which I allude was the famous court of oyer and terminer, which was constituted to try the witches at Salem and elsewhere; and the history of that court illustrates most clearly, how insecure the lives and liberties of a people may be, under the administration of a popular court.

Governor Phipps arrived here about the time that the alarm of witchcraft was at its height. He was a thorough believer in its existence; and, without waiting for a meeting of the general court, created a tribunal of seven judges,

to try the offenders. The first meeting of the court was at Salem, June 2, 1692. Stoughton was at the head of the court; and of his associates two were physicians, two merchants, and one a military man. I cannot learn, that there were any lawyers, if we except Checkley, who was acting attorney for the king, concerned in any way in these trials. It was a glorious instance of the administration of justice, without any obstruction by the quibbles and technical objections of hair-splitting attorneys. The consequence was, that every salutary rule of evidence was violated; the popular voice pronounced the victim guilty; and the business of the court seemed to be little more, than to pass sentence upon the unhappy object of popular jealousy. This court had five sessions in something less than four months, during which time, nineteen were hung for witchcraft, and one pressed to death for refusing to plead to the indictment. The one, who thus suffered, was Giles Corey, an old man nearly eighty years of age, who, knowing that his fate was sealed, and that conviction must follow, if he pleaded at all, chose rather to suffer the horrid punishment of being pressed to death for standing mute, than to make his family beggars by going through the form of a trial, and forfeiting his estate by a conviction of a felony. This is the only instance, that we have discovered, of the infliction of this punishment in America.

I know not, that any thing could have stemmed the torrent of delusion, that swept over the country at that period. But of this I am sure, that if any thing could have done it, it would have been the searching scrutiny, the eloquent appeal, and the fearless advocacy of right, which has, I think I may safely say, always distinguished the defence of persons charged with crimes, where the law has permitted them to avail themselves of the aid of enlightened counsel. Nothing has marked more distinctly the progress of liberal principles, than the change in the English courts, upon this

subject. The might of the crown can no longer be brought to bear upon the defenceless object of royal jealousy. An independent bench and a fearless bar, acting through the medium of an intelligent jury, form a barrier against the encroachments of mere physical power, behind which the innocent may feel secure. He who should read the trial of the gallant, noble Raleigh, and compare it with that of queen Caroline, in our own day, would see, at a glance, the immense progress, that has been made in the cause of justice and mercy in modern days. In the one, he would see a brave chivalrous soldier placed as a prisoner at the bar, charged with all the technicalities of the law with a capital crime, denied counsel and encountering abuse the most vile, injustice the most palpable, and misrepresentations the most gross, urged and pressed upon a prejudiced court and jury, by the savage brutality of a learned king's attorney. In the other he would see a bold, learned and unshrinking advocate, standing out in defence of the accused, and bringing the vast resources of his learning, his legal skill, his personal and professional character and experience, to bear upon that tangled web of perjury and chicane, that had been thrown around the royal victim, snapping every chord and untwisting every coil, that had confined her.

But I need not go to the old world, for illustrations like these. The memorable contest about "writs of assistance," and the still more memorable trials of captain Preston and his soldiers, for the massacre in Boston, when Adams and Quincy dared to breast the popular tide, and to carry with them the judgments of an honest jury, against the excited passions of the multitude, ought never to be forgotten, when writing the history of the bar of Massachusetts.

It was not, that the court of 1692 were not honest, and, upon many subjects, learned men. Several of them were among the most learned and upright men in the province.

But their habits of thought, their entire ignorance of the salutary rules of evidence, their want of familiarity with the process of investigating the merits of judicial controversies, unfitted them to hold the scales of justice with impartiality, or to discriminate between the excited prejudices of the many, and the truth or falsehood of the charges, upon which they were called to judge.

The fanaticism of that age may never return; but, with human nature as it is, as it has been, and always will be, it matters little, so far as the individual sufferer is concerned, whether the passions and prejudices of the judge are awakened by the fanaticism of religious bigotry, or by that of party zeal. If the popular cry is to be the criterion of what is right, the security of property is at an end; personal liberty is no longer secure; and the blood of the innocent will seal the triumph of popular justice and popular vengeance.

The organization of the superior court, under the charter of William and Mary, did not take place till December, 1692, a few days after the law creating the courts of the province had been passed. It was to consist of five judges; and that continued to be the number of that court, till after the American revolution.

A court of chancery was also established, to be kept by the governor or his substitute; and the next year this was so far modified, as to be held by three commissioners. But the law creating the court was disapproved of by the king, and never went into full effect.

The other courts of the province were the common pleas, consisting of four judges in each county; the quarter sessions, consisting of all the justices of the peace in the county; courts of admiralty held by a judge appointed by the crown; and justices of the peace, with powers similar to those now enjoyed by such officers.

The judges, who constituted the first superior court, were Stoughton, Danforth, Wait Winthrop, Richards, and Sew-

all. Their first meeting was a special term, at Salem, January 2, 1693, and the first trial before them was for witchcraft. Among the actions, pending before them the following year, there was one, in which judge Sewall was plaintiff and judge Winthrop defendant; and another which was an action of "debt," in favor of the chief justice against Seth Perry, for, in the words of the record, "refusing to pay a bond." Those, who, in modern times, have such a terror of "judge law," would probably conclude, that if the parties in the first suit were fairly matched, the unlucky defendant in the second must have had more courage than prudence, in waging war with an antagonist, upon whom he was dependent for his very weapons of controversy.

Stoughton, the chief justice, in addition to that office, was lieutenant governor, member of the council, commander-in-chief of the troops, and sometimes acting governor. He must have been a peculiar man,—a kind of Talleyrand of his day. Like the vicar of Bray, let what king, it might be, reign, he still retained his loyalty and his office. He had been a clergyman, an agent of the colony in London, an assistant under the first charter, a counsellor and deputy president under Dudley, a counsellor and judge under Andros, and combined more offices under the new charter in himself, than commonly fall to the lot of aspiring ambition. He seems to have been of that feline race of politicians, who, however they may be thrown by the revolutions of the day, are always sure to alight safely on their feet. Whether, from his thorough belief, that many of the other sex were actually witches, or not, we cannot tell, but he lived a bachelor, and died at a good old age, making an atonement for his bigotry while alive, by a provision in his will, for the benefit of science after his death, in a legacy to Harvard college.

Of his associates, Danforth was a leading political man, Sewall was educated a clergyman, while Winthrop, and Cooke, who succeeded Richards, were physicians.

It cannot be expected that I should even recapitulate the names, much less attempt to describe the character, of those who sat upon the bench of the superior court, during the provincial government. It would be found no easy task to hunt up, among the musty and forgotten records of their day, the history of those who have administered justice in this commonwealth. We should search our "biographical dictionaries" in vain, for even a complete catalogue of their names; while comparatively almost every man, of any eminence in the clerical profession, has found an ample niche in these temples of fame, our judges and our jurists have been well-nigh forgotten. Of so little consequence, in the minds of these compilers, did the place of our judges seem, that when, for instance, the character and life of Isaac Addington is spoken of, his offices as counsellor and justice of the peace are duly recorded, while the fact of his having been chief justice of the superior court is nowhere alluded to. And the name of Trowbridge—the Coke of New England—the light of whose mind, direct or reflected, has done so much to throw lustre upon the volumes of our common law, is nowhere found in the collections of Elliot or Allen.

Our courts at this period, however, were not without dignity and importance, so far as the externals of office were concerned. A peculiarity of costume seems to have distinguished the judges of this court, till 1792, when judge Dawes, who had never been a barrister, was appointed to the bench, and the other judges thereupon laid aside their robes. The last bench of judges, under the charter, were Oliver, Trowbridge, Foster Hutchinson, William Cushing, and Brown. The storm of the revolution spared Cushing alone, of this number, and he was restored to the bench, upon the reorganization of the court.

Of the period between 1692 and the revolution in 1775, it is only in the latter half, that we can discover any decided reform, in the character of the administration of

justice. Previous to this time, attorneys had been required to be sworn; but we doubt if a single lawyer had been in practice in our courts. Under the new charter, there were five, and these lawyers able and learned; but for the first half of the last century, the people seem to have been in that state, in which they always will be, where litigation is cheap, and they are their own lawyers, or are cursed with a litigious pettifogging race, who, under the name of attorneys, ruin their clients, while they disgrace their profession. Douglass, who wrote between 1746 and 1749, thus describes the people of New England. "Generally, in all our colonies, particularly in New England, people are much addicted to quirks of the law. A very ordinary countryman in New England is almost qualified for a country attorney in England." It was the bar, however, at last, that raised and dignified the character of the bench, and gave respectability to its administration of justice. It was such men as the Auchmutys, and Read, and Pratt, and Gridley, as Trowbridge and Adams, as Otis and Thacher and Quincy, that shed the splendor of their own learning, and the dignity and respectability of their own characters, over the profession to which they belonged, and the courts in which they were engaged. With such men as these among its members, the prejudices of the people were softened against the legal profession. Read was the first practising lawyer, who was ever elected to the legislature of the province. But history shows how much of the early impulses of the revolution were owing to the patriotism, the learning, the eloquence, and the courage, of the lawyers in that body.

With the political history of the bar, I have nothing to do; else I would point to men like Hawley, and Otis, and Adams, and ask where, in the broad firmament of our country's glory, we can find a brighter constellation of names than the bar of our own commonwealth could furnish.

The first lawyer, that ever sat upon the bench of the superior court, was Benjamin Lynde; and besides him and Paul Dudley, very few, educated to the profession, ever received that appointment, before the revolution. Of those who were upon the bench, when the revolution began, Trowbridge and Cushing were lawyers; and, if we except Thomas Hutchinson, who had read law, though educated as a merchant, I believe the four I have named constitute the whole number of lawyers, who had been appointed judges before the revolution.

The revolution, so far as the government was concerned, took place, in fact, in October, 1774. From that time, till the 19th of July, 1775, there was an interregnum, during which government went on only by the influence of the spontaneous will of the people. And it was not till November, 1775, that appointments were made of judges of the superior court. The persons thus appointed were John Adams, William Cushing, Nathaniel Peaselee Sargent, William Read, and Robert Treat Paine. Read and Paine declined the office, and Jedediah Foster and James Sullivan were appointed in their places. Mr. Adams never acted as judge, and in 1777 resigned the place. In the appointment of judges of this court, a new rule as to selecting lawyers was adopted. Those, who had acted with Adams and Paine and their associates, were willing to trust the ark of public justice in their custody; and it was found that a republican council, elected from the body of the people, were far more willing to confide their interests to a court of educated lawyers, than had been the royal governors of the province, who had found too many of the advocates of the common law, to be the uncompromising opposers of the encroachments of prerogative. Two persons only have sat upon this bench, who were not educated as lawyers, since the revolution. The changes, through which our supreme court has passed since the revolution, are too recent to

require my dwelling upon them, at this late period of the time allotted me. I promised to speak of the importance of a learned, honorable, and independent bar, towards a sound, faithful, and upright administration of justice; and I could not, if I would, select a stronger proof of this, than the period since the people assumed the reins of government in 1775. Since that time, our courts have gone on constantly sustaining, and, may I not say, increasing the respectability of that tribunal. They have done this, too, though the outward circumstances of dignity and form have, one after another, been frittered away. Courtesy from the bench towards the bar has taken the place of the hauteur and austerity, which once characterized their deportment; and suitors have learned to respect the dignity, and learning, and purity of the man, rather than the solemn port, the oracular response, and the outward pomp of the judge.

And yet I may ask, without derogating in the least from the influence of the bench, how much of this state of things has grown out of the increasing respectability of the bar as a body? The time has long since gone by, when it could be said of any man, as it used to be said of Trowbridge, while at the bar, that "he commanded the practice of every county which he visited, and could crush a young lawyer, by a frown or a nod." The learning of the bar has risen with the public demand upon it; and it has borrowed, while it reflected, importance from the bench.

While the dignity of the bench was hedged in by antiquated forms, and the power of the judge was but an emanation from that of the king's vicegerent, it needed little foreign aid to sustain its consequence in the eyes of loyal subjects. But how long, let any one say, would any court sustain itself, if there was no medium between the suitor and the judge? Let parties come here, with the undisciplined passions of adversary litigants, urging, perhaps an honest claim, with no acquaintance with the forms of

legal proceedings, and what would be the next step, but the prowess of the strongest? Who would sit as judge, if he was sure to encounter, upon the one side or the other, the unrestrained outpourings of heated passion? Who would sit as judge, to have his motives impugned by the one litigant or the other, in every cause he should be called upon to try?

I have thus far supposed an enlightened bench, without an enlightened bar. But, let us carry our reform another step, and place upon the bench honest well-meaning men, of good sense and practical knowledge, who shall be taken from the ordinary business walks of life. I will not suppose the court thus constituted to be called upon to investigate any of those intricate causes, which often seem to defy all analysis; but let its judges take the causes of any term, as they rise. Let each suitor press his own claims upon their sense of justice, in his own way, let a neighborhood, or party, take an interest in the decision, and what could be hoped for better than chaos and confusion? Law would become a shapeless thing, without symmetry and without rule; and if it ceased to be "judge law," it would be, because the mockery of courts would have given place to the will of the strongest party among the people.

I have over and again spoken of an independent bar; and, hitherto, the laws of the land have so far encouraged such an institution, that the members of the several bars were able to exercise something like a salutary restraint, upon any who would abuse the opportunities they enjoyed. Associations might be formed, rules for their own government might be adopted, and the associated influence of honorable minds might be exerted upon each other, and upon those who were within their influence. But these associations have fallen under the ban of public disapprobation. The cry of "monopoly" and "aristocracy" has been raised against them, and ours expires to night.

It is sickening to an honorable man, to listen to this ridiculous outcry, which has been, at times, raised against the "aristocracy of the bar," the "monopoly of the law." What notion can such men attach to the language they use? Aristocracy? and of what?—of family? Who have filled these places before us? who have sat upon our judicial bench? Men born to place? men reared in the lap of indolence and wealth, and placed by the patronage of power in stations of ease and independence? Go, read their story,—their birth often in poverty,—their often friendless and unaided struggle in early life, to surmount the difficulties that providence had thrown around them,—their long and anxious hours of toil and almost hopeless years of unrewarded industry,—and then say, if theirs is the aristocracy of birth?

Is it of wealth? It is a sorry trick, that calls for the sacrifice of one's all to what are called the decencies of life, and then makes that very sacrifice the ground of opprobrium and reproach.

This is no new crusade; and those, who have fondly hoped to see this dreaded "monopoly" suppressed, might learn from the history of other times, how idle are those hopes. There will be lawyers, and there will be judges, till knavery and crime shall no longer require their vigilance for detection. And there will be "judge law" too, and cases will arise every day, which no code can have anticipated, nor human sagacity foreseen.

Take the business of society as it is, take the relations of life as they are, and who does not see that new combinations are constantly arising, and that new combinations of circumstances will for ever be constantly arising, which will require the exercise of judicial determination. The judge must often decree what could not have been written before. He may be guided by the laws of analogy, and aided by the provisions of a code, skilfully drawn; but it must be, after all, "the mind that is to be the judge."

There is no room for reason in the decree of a despot; but the freer a people is, the wider their commerce, the more perfect their arts, and the more refined their social condition, the more scope must be given to an enlightened reason, in regulating and adjusting the jarring elements of their civil policy.

It is for this reason, that we now have and always shall have, a "common" and unwritten law. All the codes in the world could not prevent it, and we have reason to bless God, that our lot has been cast under the influence of the milder form of the English common law. I do not say this rashly, nor without consideration. I mean by the common law, such parts of it as were suited to the condition of our ancestors, and were brought here by them, together with such additional elements, as our increasing wants and the changes in our civil policy have introduced.

I trace back its history to the rude ages of a half barbarous people, but I find there a stern love of liberty; and, if no more, I there trace the origin of our surest safeguard of personal rights, a trial by jury. I follow this law in its opening developements, as the arts of life and the refinements of society demand its aid, and, while the Bastile and the Inquisition were crowded with the victims of state and church jealousy, whose prayers for deliverance never reached beyond their dungeon walls, I see the genius of the common law stretching out her protecting arm over the humblest citizen, and, with her own peculiar mandate, opening the prison door, that the oppressed might go free. I see a system, designed in its origin for a feudal age, expanding to meet the wants of a business community, and engrafting upon her vigorous stock that generous and rational system, which regulates the wide-spread relations of an almost boundless commerce. I trace a portion of that system to our own shores; and, though for many years, it had but a feeble existence, kept down as it was by the influence of

written bodies of laws, dictated not by lawyers but by the clergy,—the good men of their time,—who, in their zeal for their cause, openly advocated the adoption of a theocracy—I see it springing up, at last, into a more healthy growth, supplanting the cruel and bloody precepts of the Mosaic code, and winning its way to the confidence and affections of a free people. I hear its precepts quoted by the earliest advocates for American independence, and clung to through all that struggle for liberty. I see our constitution itself based upon the existence of the common law; and I see that same common law mingling with and affecting every relation of life, from the first hour of infancy to the last struggle of faltering old age; and I find it in every form the law of a free people.

It is an essence rather than a tangible existence. It is an essence pervading society in all its ramifications. We may codify it as much as we please; still we must have, and shall have a common law to give vitality to the very code itself.

Plausible as the theory is, a perfect and final code of the law, by which we are to be governed, can never be produced. Judges we must have, and with such a system of laws, next to a wicked judge, is to have an ignorant and an incompetent one.

So far as the bar of this commonwealth is concerned, we are entering upon a new experiment, which, for one, I am not sorry to see tried. The public demands and the public will have intelligent and honorable men in every bar. There may be a classification of its members, but it must be like that which we meet with in the world, between the good and bad; and the growing intelligence of the community will at last make a just discrimination.

Our fundamental law, with our institutions, must remain. It is so interwoven with every thing we call our own, and with every thing we would wish to protect, that it cannot be

struck out of being, without destroying, at the same time, our social organization. "It is," says a writer, "interwoven with the very idiom that we speak; and we cannot learn another system of laws, without learning at the same time another language; we cannot think of right or of wrong, but through the medium of the ideas, that we have derived from the common law."

There are, it is true, in the signs of the times, some shadowy portents to overcast our hopes. But they should not hang over us in vain. It is no time for one class alone of the community to be vigilant and faithful. Let associations hereafter be,—not of lawyers,—but of men, bold, determined freemen, resolved, in the consciousness of a just cause, to stand by our country and maintain her liberties and her laws.

ART. IV.—ON THE COGNIZANCE BY THE TRIBUNALS OF ONE STATE, OF A LARCENY COMMITTED IN ANOTHER.

It is now more than thirty years, since the supreme judicial court of Massachusetts, in the case of the *Commonwealth v. Cullins*,¹ extended its cognizance to cases of larceny, committed out of its territorial jurisdiction, when the thief comes with the property within the limits of the state. This original decision of judge Sedgwick is founded, perhaps entirely, upon the relation, which the several states of this union, like the several counties of the same state, were supposed to bear to each other. Two years afterwards, in 1806, the point was more strenuously contested, in the case of the *Commonwealth v. Andrews*,² and the former decision was confirmed by all the judges. The additional light, to be derived from the several long opinions,

¹ 1 Mass. Rep. 116.

² 2 Mass. Rep. 14.

delivered on this occasion, is, that the only ground, upon which a criminal may be punished in a county, into which he takes stolen property, rests upon the supposition, that such act amounts to a new taking; since, by intendment of law, the owner does not part with the possession of his property, or, according to chief justice Dana, every moment's felonious possession is, in contemplation of law, a new taking.¹ The mere advocate might find some matter for comment, in the alleged sanctity of former decisions, and the supposed infallibility of Cullins's case, alluded to in these solemn opinions. The holy indignation, which disclaims all tenderness for thieves, and professes its willingness, that they should be punished by every state, into which they should take the stolen goods, might seem to admit the doctrine, that the suffering of a punishment in one state could not be a bar to a trial and condemnation for the same offence in another. The amount of these two decisions, in fact, is, that every moment's possession of the stolen property, as well as every amotion of it, is a new and distinct larceny, which no prior trial out of the state can excuse.

The common law requires the trial of all cases, both civil and criminal, to be in the very district, where the cause of complaint arose;² and such appears to have remained the law, in England, until the statute 13 George III. ch. 31, § 4, enacted, that any person stealing goods in one part of the kingdom, and fleeing with them into another, might there be made answerable for the offence; but at no time has this provision been extended to cases, where the original taking was without the kingdom. This statute did not apply to the American colonies any more than it did to France. Judge Sedgwick seems to have been too hasty, in

¹ 2 East's Pleas of the Crown, ch. xvi. § 156.

² Story's Conflict of Laws, 516.

resting his opinion upon an irrelevant, and what must have appeared to be an incidental expression of an English judge.

The common law of England was, in most respects, the law of Massachusetts, except where it had been modified or superseded by legislative action; but between the several United States there is no statute or provision, which operates among them, respectively, like the statute above mentioned, between England and Scotland; yet, in the integral parts of Massachusetts, the old common law is of course applicable and applied. The framers of the federal constitution were not unmindful of these general truths; and, in that instrument, provision was made, for the delivery up of any person charged with treason, felony, or other crime, to the authorities of the state, from whence he may have fled;—thus presupposing, that the state in which the offence was committed could alone have jurisdiction of it. If the dispensation of the Massachusetts jurisprudence with this constitutional provision be correct, it certainly affords an instance of a conflict of laws, which, it is to be hoped, will never give occasion to any thing more serious than an awkward dilemma. The criminal is deprived of the relief or excuse, which he might obtain from evidence and circumstances at a distance; and, should he insist, that the crime was punishable with less severity, in the state where it was committed, than in that before whose tribunal he was arraigned, his plea would avail him nothing; for it is beyond the power of a state court to inquire officially into the laws of a foreign state.¹ Some of the states are governed in part by the civil law; in the greater number of them, the common law prevails; while each state has its statute laws peculiar to itself. There is no truth, then, in the assertion (which is, in effect, made), that the same law prevails alike in Maine, Louisiana and Michigan; and that these several states stand to

¹ 17 Mass. Reports, 516.

each other in the relation of different counties of the same state. In the case of the *Commonwealth v. Andrews*, the defendant had committed an actual trespass, by receiving the stolen goods within the state. It was entirely unnecessary, on that occasion, to introduce an English decision, inculcating the doctrine, that every moving of stolen goods constitutes a new taking, and thereby to adopt into our criminal law a fiction, which punishes the innocent and the guilty alike, when taken within the borders of the state; while the common law, by which this fiction is supposed to be sanctioned, declares crime to be local and punishable only where it is committed. Such is the true character of the above-named decisions; which, to speak in plain terms, are founded in misapprehension, and are unsanctioned by the common law or by any legislative action.

It will not be without interest, in reference to this point, to examine very briefly the practice and decisions of some of the other states. Within the last quarter of a century, the question has more than once been decided by the courts of New York, contrary to the received law of Massachusetts.¹ In Pennsylvania, the practice had been opposed to that in New York, when, in consequence perhaps of the decisions in Massachusetts, the subject was examined by the Pennsylvania court, which unanimously declared, that the judiciary of that state had no jurisdiction over a felon escaping from another state.² It was remarked, on that occasion, that the penal laws of Pennsylvania were less severe than those of Delaware;—that, in civil cases, a fiction had been introduced, to dispense with the trial's being had in the very county where the cause of complaint arose;—but, that, in criminal jurisprudence, such a proceeding had never been authorized by or known to the English common law.

¹ 2 Johnson's Reports, 477, 479; 2 Caines' Cases, 213.

² 5 Binney's Reports, 617.

The supreme court of the state of Connecticut have examined the law, which had existed there *sub silentio*; and a majority of the judges, justifying themselves by the precedent of Massachusetts, yielded to the uniform practice of the state, without, however, venturing to vindicate it. The opinion of judge Peters, who dissented from his brethren, throws a strong light on the subject; and, so long as the prevailing doctrine endures, will continue to expose it in all its weakness and deformity.

It is difficult to understand, why the Massachusetts jurisprudence, on this point, founded originally in error, and existing now only by the force of precedent, should still be maintained as sound;—while it is acknowledged to rest on an unnatural and useless fiction,—is opposed to the manifest sense of the federal constitution,—and conflicts with the decisions and practice of other states.

B. S.
Portland, Me.

ART. V.—ON JUDICIAL OATHS.

THE subject of judicial oaths has been made almost exclusively a matter of religious discussion. While Penn and Barclay on the one side, and Milton and Paley on the other, have tested the lawfulness of the oath by scriptural authority, the jurists, with the exception of Bentham, have regarded the subject as an unimportant question of casuistry, and have neglected to inquire into its practical and legal bearings. The circumstance, that this ceremony offends the religious scruples of so large a portion of the community, would be in itself a sufficient reason for inquiring if the law needs this offensive sanction; but when the oath is impugned as a useless form; when its sanctions are declared to be inoperative; when it is said to be a direct impediment to that investigation of truth, which it is intended

to secure ; it becomes the duty of the jurist, to give serious attention to these objections. Claiming then as we do a concurrent jurisdiction of this subject-matter, with the writers upon moral philosophy, we shall attempt, in the present article, an inquiry into the necessity, expediency and lawfulness of judicial oaths.

We will first consider the necessity of the oath, as a security for veracity. Dr. Paley interprets an oath to be " the calling upon God to take notice of what we say, and invoking his vengeance or renouncing his favor, if what we say be false, or what we promise be not performed." The object then of using the oath is, that, by the solemnity of the invocation, and by the operation of the belief, that future punishment will follow the commission of perjury, the religious obligation to veracity may be increased. It is evident, therefore, that upon two classes of men the oath will be useless ; religious men with whom the natural obligation to speak the truth will be a sufficient inducement to veracity ; and irreligious men who would be indifferent to any new sanction, which religion could impose. The oath then can be operative only upon those men, who have some religious tendencies, but who are only partially and casually subject to religious influences. But even upon this class, we believe, that the oath as such has no effect in increasing the religious obligation to observe veracity ; for the oath does not in point of fact impose the religious sanctions, which it is intended to create. Dr. Paley says, that the form of swearing, which we adopt, is the very worst contrived to express the meaning or obligation of the oath. Many men consequently take the oath, without understanding the peculiar obligations which they assume, or the force of the imprecations which they invoke upon themselves. The juror regards the oath as a mere ceremony of the law, rather than as a sanction of religion, and naturally connects it in importance and signification, with the many forms of

judicial proceedings, which appear to him to have no meaning or object, but which the law requires to be observed. What force or truth, then, is there in the assumption of the law, that the solemn imprecation of divine vengeance will necessarily induce men to speak the truth, when in practice we find that most men never know or think, that they are making such an invocation,—when the solemn imprecation and even the name of the deity are to them as mere formal sounds.

Even where the meaning of the oath is understood, it does not increase the religious obligation to speak the truth. The obligation to speak the truth on solemn occasions is absolute and perfect. The oath can in reality add nothing to the obligation. It is said, that the oath awakens and excites the religious sense; and that by bringing the idea of divine vengeance before the mind, it presents in a more forcible manner the moral obligation. Now it is evident, that no mere form will excite these feelings. An oath will have this power, only as it is connected with solemn associations and exciting circumstances. An oath, imposed under such solemn and imposing circumstances, as to excite the imagination and invest the ceremony with superstitious terrors, may add greatly to the security of the promise; as, when in feudal times, the juror ratified his oath by drinking from a bowl of blood; or, as when William the conqueror swore Harold upon an altar filled with the relics of departed martyrs. But what associations of solemnity give efficacy to the oath as now administered? Its frequency has deprived it of all its original solemnity. When, as Dr. Paley says, not a pound of tea can travel from the ship to the consumer, without costing half a dozen oaths at least; when the same solemn invocation is made by the incumbent of the pettiest office and the holder of the highest official trust; when oaths have thus become as familiar as household words, what sanctions of solemnity or associa-

tions of religious awe can be connected with their use? It is the constitutional tendency of the human mind, to become indifferent to things, which are of constant occurrence. Even the most imposing ceremonials at length lose their power to excite the imagination. The most solemn words and forms may be heard and uttered, until their original force and meaning are entirely lost. There is little doubt, that the common practice of profane swearing originated in a reverent and serious use, in solemn protestations, of the terms of the oaths, which are now profanely uttered. The individual, who once pronounced the name of the deity with awe, from frequent use, at length attaches no idea to the name which he blasphemously invokes. Why must not the same effect follow from the frequency of legal swearing? The manner in which the oath is usually administered in courts of justice, the rapid careless mode of adjuration, as destitute of solemnity as the court crier's vociferations, the irreverent manner in which the name of the deity is pronounced, the swearing of witnesses by squads, by which the sense of individual accountability is weakened—all these things tend necessarily to dispel the religious feeling, which the oath was designed to produce. What possible efficacy, then, can there be in an oath, the very meaning of which perhaps is not understood, and, which, from the frequency and mode of adjuration, is regarded as a mere ceremony, to excite the sense of religious obligation in those men, who are so destitute of moral feeling, as to need some remarkable inducement to veracity?

That men are not induced to observe their promises, by the obligation which the oath imposes, is shewn by the fact, that the same men disregard and observe different parts of the same promise under oath. If the oath is the inducement to veracity, all promises, and all parts of promises under oath, will be equally binding. But we find, that while some of these promises are observed, others are per-

fectly nugatory. Every witness, who takes an oath in our courts of justice, swears that in relation to the matters pending in trial, he will speak the *whole* truth. Now there is not one witness in a hundred, who tells every particular lying within his knowledge, which he knows is pertinent to the matter in issue. Every attorney in England, and in most of our states, with little variation, swears upon his admission to practice, that he "will do no falsehood nor consent to the doing of any; and if he knows of an intention to commit any, that he will give knowledge thereof to the justices of the court, that it may be prevented." Now there is hardly a member of the profession, who considers the latter part of this promise, although he has sworn to observe it, in any degree binding upon him, or who would subject himself to the disgrace of an informer, by giving notice to the court of every instance of dishonesty, which might come to his knowledge.¹

But again there are promises sanctioned by the oath, which are rarely broken. The oath of the jurymen, when sworn upon his *voir dire*, to make true answer to all such questions as may be asked, is almost always observed. The promise of the witness to speak the truth, so far as he tells any thing, is not often broken. That portion of the attorney's oath, in which he promises to observe due

¹ That portion of the attorney's oath, referred to above, has been abolished in Massachusetts by the Revised Statutes, ch. 88, § 22. The oath taken on admission to practice as an attorney, in the courts of that state, is, that the party will conduct himself, in the office of an attorney, according to the best of his knowledge and discretion, and with all good fidelity, as well to the courts as to his clients. It would be curious and not uninteresting, to inquire into the origin of that part of the old form, which is alluded to in the text. We doubt whether it makes a part of the form used in England; which, as prescribed by the 2 Geo. 2, ch. 23, is, that the applicant will truly and honestly demean himself in the practice of an attorney, according to the best of his knowledge and ability.—ED. JUR.

fidelity to his client, we may say is almost never broken. The religious sanction to veracity is the same in all these cases; the same solemn invocation is made in every instance; but, if in one class of cases the promise is observed and in the other disregarded, the promise cannot owe its efficacy to the peculiar religious sanction of the oath, but to some other circumstance.

Let us see what the circumstances are, which induce men to observe the truth in judicial testimony. The principal inducements appear to be a general sense of moral obligation; this same sense of obligation, as presented in peculiar force by the solemnity of the occasion; the fear of public opinion, and the apprehension of legal penalties. Every man will naturally speak the truth, unless he has very strong motives for falsehood. No motive for veracity can be superinduced, which will have half the efficacy of this original tendency. The circumstances, under which the testimony is given, peculiarly enforce the obligation to speak the truth. When a witness of any conscience or reflection considers all the circumstances, which are brought to view in a cause wherein his testimony is demanded; when he considers the publicity of his evidence, the consequences depending on his statements, the confidence placed in his word, and the evils which would result to society, if the confidence in human testimony were weakened, he requires not the sanction of an oath. He feels, that

A cause like this is its own sacrament,
Truth, justice, reason, love and liberty,
The eternal links, that clasp the world, are in it,
And he, who breaks their sanction, breaks all law,
And infinite connection.

The restraints and fear of public opinion operate very powerfully in securing the truth. The power of public opinion operates, even when there is no fear of its censure.

We refrain from those things, which public opinion reprobates, not only from a fear of disgrace, but because our estimate of right and wrong being modified by this influence, conscience always operates more powerfully, in relation to those things which public opinion condemns. We have before shewn, that certain promises under oath are universally observed, while others are as often violated. We find a ready reason for this difference, in the fact, that public opinion requires the observance of one class of promises, but applies no sanction to the other. Public opinion does not require, that the witness should speak the *whole* truth. It would reprobate the attorney, who should inform as he has promised in his oath. The consequence is, that these oaths are disregarded. If a witness tells a direct falsehood in his testimony, he is exposed to the strongest public censure. If the attorney violates his fidelity to his client, he is inevitably disgraced. As we have before observed, promises to refrain from these crimes are very rarely violated.

The fear of legal penalties, which is another inducement to veracity, although a less powerful motive than the others, must have some efficacy, as the punishment attached to false swearing is one of the most severe in our penal code; and, it is obvious, that if the fear of punishment restrains men from the commission of other crimes, it will restrain them from perjury. It is evident, that the inducement to veracity, which is contained in the fear of legal penalties, applies with equal force to simple affirmations and to solemn oaths.

If we judge the oath by the surer test of experience, we have a more convincing proof of its inefficacy. The experience of mankind, even centuries ago, proved the oath to be an useless form. Cicero declared, that, in his day, a man who would lie would also commit perjury. Although under the Roman system, the prosecutor in public crimes could do nothing without making the preliminary oath, that the

charge was just, this did not prevent the most ignominious system of false accusations, that the world has ever known. Blackstone informs us, that the trial of the clergy by purgation, in the ancient English ecclesiastical courts, a mode of trial which consisted of nothing but an accumulation of oaths, was a vast complication of perjury and falsehood. How far did the sanction of the oath of calumny, by which the parties in the ecclesiastical and admiralty courts swore to the merits of their cases, purge these courts from the falsehoods, which contaminated other tribunals? Did these courts, under the protection of this sanction, possess a greater purity than the courts of common law, which had no such sanction. Although this oath has been disused for over an hundred years, is the investigation of truth less successful now than in ancient times? The practice of the civil law affords an admirable commentary upon the utility of the oath, which constituted an important part of its judicial proceedings. The treatise of Heineccius, upon the uselessness of the suppletory oath, and the account given by Stiernhook of the abuse of the oath of purgation, under the canon law of the old Swedish constitution, show the contempt into which the oath had fallen in the ancient continental courts. The experience of France, as to the value of the oath of the parties, is the same. Domat says, that the oath served to no other purpose, than to be an occasion of perjury, either to the one party or the other, or sometimes to both; and, although it has been renewed by the ordinance, yet at present it is altogether disused, and no mention made of it. The testimony of Pothier is no less unequivocal; for he says, "In forty years practice, I have only met two instances, where the parties, in the case of an oath offered after evidence, have been prevented by a sense of religion from persisting in their testimonies." If any further proof were required of the uselessness and even mischiefs of this ceremony, we might refer to the con-

sequences, which have resulted from the introduction by the English, of the system of swearing into the courts of India, where the oath had been in great disesteem. So little benefit followed from the innovation, that the late Ram-mohun Roy, while lamenting the extent, to which native falsehood prevails in the courts in India, declares, that it has grown up under the English system and was not so before.

The study of English history alone should satisfy us, how little dependence may be placed upon the sanction, which the oath gives to a promise. The whole of the male population in England, at the age of twelve years, was formerly sworn at the court leet, to observe allegiance to the sovereign. The insurrections and rebellions, which then agitated the kingdom, and the present comparative loyalty of the people, although the oath of allegiance has long been disused, show how little power there was in this ceremony to bind the conscience. So much importance was formerly attached to the coronation oath, that Richard II., who had been crowned when eleven years old, was afterwards sworn upon the cross of Canterbury, that the most solemn sanctions of the oath might be imposed upon his conscience. The result was an admirable illustration of the efficacy of these sanctions.

The uselessness of oaths is a matter of every day experience. We believe, that we may hazard the assertion, that the testimony of most members of the profession would be, that the oath offers a very slight if any security for veracity. There is no class of men, whose veracity is so much relied on as the quakers, who never use the oath. The anabaptists in Holland have been suffered to testify for over two hundred years without the oath. To the mennonites, a branch of the anabaptists, belong a very large share of the wealth, commerce, and influence of Holland. The witnesses before committees, in both houses of

the British parliament, are examined without oath. The peers of England are never required to take the oath, in delivering their testimony in courts of justice. Oath evidence is not required in courts-martial. No inconvenience has ever resulted from the disuse of the oath in these cases. And there are no peculiar motives to veracity, which apply to these individuals and cases, which will not apply to every case and every individual. We may then say, that the testimony of experience is decided, that affirmations and the natural obligations of duty are sufficient.

We find, now, in looking back upon the views, which we have taken, that oaths cannot induce men to speak the truth, by exciting their religious feelings. We find, that the oath cannot be the inducement to veracity, as the sense of obligation to observe the promise made in the oath varies according to circumstances, which are entirely independent of the oath. We find, that the principal inducements to veracity apply as well to simple affirmations, as to promises under oath. We find, that extensive experience has tested the sufficiency of the natural obligations to veracity. We therefore conclude, that oaths are wholly unnecessary, as securities for truth.

We will now consider the expediency of the use of oaths. We do not hesitate to say, that they are productive of positive evil. The first great objection to their use is their tendency to increase falsehood and weaken the force of simple affirmations. Mr. Dymond very justly says, "that the tendency of instituting oaths is manifestly to diffuse the sentiment, that there is a difference in the degree of the obligation, not to lie and not to swear falsely. This difference is not made, by adding stronger motives to veracity by oath, but by deducting from the motives to veracity in simple affirmations." Now, it is obvious, if we are taught to believe, that the obligation to speak the truth under oath is higher than in simple affirmations, and still see the oath

every day violated with impunity and without disgrace, that the sense of the obligation to truth is exceedingly weakened.

An evil no less to be deprecated results from the use of oaths, in their tendency to diminish the power of religious impressions. The most solemn invocations to the deity are made upon the most trifling occasions. Men imprecate divine vengeance upon themselves, and act practically as if it imposed no new sanction. The most tremendous considerations, which can be brought before the human mind, are trifled with and contemned. Men cannot treat such things lightly, without deadening their religious susceptibility and diminishing the sentiment of reverence, which is so essential a safeguard of virtue.

The purposes of justice would be better accomplished without the oath; for, much important testimony has been and will be excluded, by making the oath indispensable. As the sanction of the oath consists in invoking the vengeance of God, the law requires such a religious belief, as will make this sanction operative. "In the gloomy days of superstition and ignorance," says Mr. Dane, "a man could not be a witness, who did not believe in the religion of the country, in which he was called to give evidence. Those who did not believe in christianity, and sometimes in christianity of a certain description, were deemed incapable of binding themselves by oath." An exception to the rigidity of this rule was at length adopted, in the courts of common law, in favor of the Jews, who were allowed to make oath upon the books of Moses. A still more liberal rule was adopted in the case of *Omychund v. Barker*, in the year 1774, when it was decided, that a pagan might be permitted to testify, by swearing according to the form of his religion. The principle, however, was affirmed, that one, who did not believe in God or future rewards and punishments, could not be sworn as a witness. Although in some instances,

within a few years, a disbelief in future punishments has been held to be a disqualification of a witness, such a belief is now allowed to go only to the credibility of the witness. Yet the rule of law still remains, that one who does not believe in God or a future state is incompetent. Instances have occurred of the exclusion of men, whose general character was unimpeachable, upon proof of their disbelief. If the value of testimony is to depend upon that religious sanction, which the oath is said to impose, the most rigid doctrine of law is consistent and proper. But such an exclusion, as the law demands, must sometimes be manifestly subversive of justice. An individual, who is so unhappy as not to have the belief, which the law requires, though he may be perfectly trustworthy, may have within his sole knowledge all the facts in an important case. But still he would not feel the religious sanction of the oath, although he might have every other inducement to speak the truth. His evidence, therefore, in the very face of common sense and justice, must be excluded. What seems to add to the injustice of such an exclusion, is the consideration, that, with the religious feelings which now prevail, the individual who has openly avowed his disbelief has, by the very avowal which excludes his testimony, given the strongest evidence of his sincerity.

There may be an exclusion of proper and useful evidence in another way, under the present system. An individual may feign disbelief to avoid giving testimony. Although it seems hardly probable, that such a case should occur, the fact, that an individual recently disqualified himself in England by feigning disbelief, gives force to this objection to our system of swearing. The inconvenience and injustice, which result from the exclusion of testimony, must exist so long as the oath is required, and until those sanctions only are demanded, which will apply to simple affirmation.

The system of swearing produces much false testimony

in courts of justice. This is done through the door of prevarication, which is opened by a ceremony, which appeals to the imagination rather than to the sense of simple obligation. Many ignorant men, who will make use of every plausible sophistry, by which to compound with their consciences, find in the ceremony of the oath a ready escape from the too simple obligation to truth. They are taught by what the law practically says, that the whole obligation to veracity is imposed by the solemn oath; that all other obligations are taken away, and transferred to and merged in the oath; and that the form is not the accessory but the principal. They believe, that if they can evade the oath in any way, as by omitting any of the solemnities or forms, which are required in its administration, they may commit falsehood, as to the testimony which follows the oath, without blame. It is well known, that an impression prevails among the lower classes in England and Ireland, where the ceremony of the oath consists in kissing the bible, that if the lips do not touch the book, or if some profane volume can be substituted for the evangelists, the oath is not binding. The number of perjuries, which are committed through this evasion alone, would be a sufficient reason for the disuse of a ceremony, by which these evasions are admitted. No such evasions could be made, in the use of simple affirmations, or, if men, instead of fixing their attention upon the single substantive vice of perjury, were taught that the obligation attached to every assertion and word uttered by the witness.

The law, which acknowledges the superior sanction of the oath, to the simple promise to which it is annexed, gives the oath the power of making its claims paramount to every other obligation. As long as such virtue is attributed to oaths, casuistry will enforce the doctrine, that they have an absolute prerogative above every duty. The most horrid crimes have in all ages been committed, under the influence

of this doctrine. It is well known, that secret societies have for a long time existed in Germany, France and Ireland, which, under the sanctity of this ceremony, have defied all the restraints of human and divine law. The law, which recognises the abstract authority of the oath, must blame itself for creating an instrument, which must be always turned against itself. While it needs no factitious aid, it creates a principle, which, though weak for good, must be powerful for evil. The law, which denies the sanction of this ceremony, will destroy a shield, behind which superstition and crime have for centuries defended themselves, and by which a criminal sophistry will always avoid the claims of an inconvenient duty. As an able writer has said, "the arrogant pretensions of an oath have survived into an age, with which they have nothing in common. It is time, that the wand of the magician should be known and described as what it is,—a common stick."

Our last and most important inquiry is in relation to the lawfulness of oaths. In pursuing this inquiry, we shall be necessarily led into a scriptural discussion, which may seem somewhat out of place in a legal journal. Yet it seems indispensable, to the thorough investigation of a purely religious ceremony, to test it by that authority, which the law acknowledges, when it adopts a religious sanction.

The christian doctrine in relation to oaths is found in Christ's sermon on the mount. It is this: "Ye have heard, that it hath been said by them of old time, thou shalt not forswear thyself, but shall perform unto the Lord thine oaths. But I say unto you, swear not at all, neither (or as it may be rendered "not even") by heaven, for it is God's throne; nor by the earth, for it is his footstool; neither by Jerusalem, for it is the city of the great King: Neither shalt thou swear by thy head; because thou canst not make one hair white or black. But let your commu-

nication be yea, yea ; nay, nay : for whatsoever is more than this cometh of evil." It would seem, that if usage had not prejudiced us in favor of the oath, and the question should arise, whether an oath of any name or nature were lawful, we could not hesitate a moment, to decide in the negative. In the first place, we are negatively commanded, to "swear not at all ;" and, lastly, positively enjoined to make our communications by the simple "yea and nay." Again we find St. James repeating this injunction, and commanding us "neither to swear by heaven ; neither by earth ; neither by any other oath." But notwithstanding these positive prohibitions, the use of judicial oaths is justified upon scriptural grounds. It is said, in the first place, that Christ's injunction does not prohibit judicial or solemn oaths, but only the practice of profane and wanton swearing. To this we reply, that no exception is made in favor of judicial oaths. The command is clearly given : "swear not at all." In the other prohibitions, which are found in the chapter, which contains this injunction, the exceptions where they are made are distinctly and expressly stated ; as where anger is prohibited, there is an express exception of anger with cause ; and in the prohibition of divorcement, a divorce on account of fornication is distinctly excepted. In a clear methodical discourse, like the sermon on the mount, embodying all the great rules of christian conduct, so important an exception, as the one claimed by our opponents, could not have been inadvertently omitted. Certainly, we should hesitate to make void any part of a general prohibition, unless the exception is as clearly and evidently expressed as the prohibition.

Again, by comparing this prohibition with the others in the same chapter, we may clearly infer, that judicial oaths could not have been excepted. Our Saviour is illustrating his position, that he "came not to destroy the law but to fulfil" or complete—that he is not prohibiting what Moses

commanded, but that he goes still farther than Moses—that he carries out more fully the principles which Moses established. Christ refers to the law of Moses, which forbids murder, and shows that he goes beyond Moses, and precludes murder by taking away anger. Moses forbade adultery; Christ goes farther, and removes the temptation to adultery, by taking away desire. Moses commanded, that men should render only equal retaliation; but Christ forbids all retaliation. Moses commanded love to neighbors; Christ enjoins love to all. Moses prohibited divorce, except with legal forms; Christ forbids divorce in all cases, with the sole exception of fornication. The prohibition of oaths is in the same connection with the other prohibitions. Christ refers to what was “said by them of old time,” and compares his precept with theirs, for the evident purpose of showing, that he enjoined something more upon this subject, than Moses commanded. Now the law of Moses had expressly prohibited profane and wanton swearing, in the commandment, “thou shalt not take the name of the Lord thy God in vain.” It had forbidden men to break their oaths, by the precept, “if a man swear an oath to bind his soul, he shall not break his word.” It had forbidden men to swear by any other name than God; for he says, “thou shalt fear the Lord thy God and serve him alone; thou shalt cleave to him and swear by his name.” It is evident, therefore, that if Christ would have commanded something more in relation to oaths than Moses enjoined, nothing was left for him, but to prohibit solemn judicial oaths.

It is said by some, that this prohibition refers to swearing by inferior things alone, but not to the oath by the supreme being. To this we answer, that when Christ forbids us to swear by heaven, because he who swears by heaven swears by the throne of God and by him who sitteth thereon, he thereby clearly forbids us to swear by God. Again, we say, that as the injunction “swear not at all” immediately

succeeds the reference to swearing by the Lord, it is evident, that the oath by the supreme being was intended by the prohibition. There was no need of expressly mentioning the swearing by God, as an invocation upon the deity is of course understood by the very name of swearing. The oath by the supreme being must have been intended in the prohibition ; for, the very reason, which is given for the impropriety of the oath by inferior things, is that they are so connected with God, that those who swear by them swear also by the supreme being : for the heavens are God's throne and the earth his footstool ; Jerusalem his city ; even our very persons are his ; he alone has power over the meanest portions of our frames ; for we could not make one hair white or black.

It is said by the advocates of oaths, that Christ himself swore : as when the high priest addressed him, " I adjure thee by the living God, to declare whether thou be the Christ the Son of God," Christ, in replying " thou hast said," took an oath. We do not deem it necessary to use the answer of Barclay to this argument, " that even though Christ had sworn, being yet under the law, this would no ways oblige us under the gospel ; as neither circumcision or the celebration of the paschal lamb." Neither do we deem it necessary to use the argument of St. Jerome, " that though Christ had sworn, all things agree not unto us, who are servants, that agreed unto our Lord. The Lord swore as Lord, whom no man did forbid to swear ; but unto us, who are servants, it is not lawful to swear, because we are forbidden by the law of our Lord." We maintain that Christ did not use an oath. There is an absurdity in the idea, that the prisoner should have been required to swear to his guilt. The simple declaration, that he was the Son of God was all that was required. There was no need of his oath to this declaration. The address of the high priest was only a more solemn and urgent solicitation, made in a

more urgent form, because his first question was not answered. By the term *adjure* in this connection, he meant, I solemnly exhort and enjoin that thou answer. The meaning of adjure in this passage is the same as in that, in which the evil spirit says, "I adjure thee by the living God that thou torment me not." The interpretation, which we are opposing, would understand the evil spirit to have administered an oath, no less than the high priest. But by the most natural and obvious understanding of the passage, which is deemed an authority for swearing, Christ did not take upon himself an oath, by replying, but merely answered the high priest's urgent appeal.

It is said that Paul swore, and that what he did cannot be wrong. Paul made use of such expressions as these: "God is my witness, that, without ceasing, I make mention of you always, in my prayers;" "For God is my record;" "Behold before God I lie not." But it seems to us, that these expressions can be regarded as nothing more than the solemn and emphatical language of one, who, feeling a strong sense of accountability to God, constantly declared, that he acted in view of that accountability. But to constitute an oath, according to Milton, there must be an invocation of "a curse upon ourselves," and according to Paley, "an invocation of God's vengeance;" and both these writers cite the example of Paul, as authority for swearing. But can it be said, that there is any thing in the expressions which Paul uses, like an invocation of vengeance? Can any thing more be understood by them, than his serious assertions, that God is a witness of his acts and feelings?

The last argument of our opponents, which we shall attempt to answer, is the position, that the command to swear is a moral precept of eternal duration, and that it cannot be wrong to commit that, which God himself has expressly enjoined. We maintain, that the command, "thou shalt fear the Lord thy God and serve him and swear by his

name," is not, as is argued, a divine institution of swearing. Basil the great said, "that swearing was the effect of sin;" and Chrysostom said, "that an oath entered when evil grew; when men exercised their frauds; when all foundations were overturned; that oaths took their beginning from a want of truth." It is well known, that oaths have formed an important feature of the superstitions of all pagan nations, and that among the ancient pagans they were administered with the most imposing solemnities, and were believed to impose the most tremendous sanctions. When we consider this, the inference is obvious, that the injunction above referred to was intended to regulate and restrain an abuse, which was already prevalent,—to restrain the Jews from swearing by the idolatrous oaths of the heathens. The force of the injunction did not consist in the command to make use of oaths, as is maintained, but when using the oath to swear by the only true God. The passage, which immediately follows this injunction, "thou shalt not go after other gods, of the gods of the people which are around you," seems clearly to confirm this view. We should require a better authority for the divine institution of oaths, than a passage whose sole obvious purpose was a prohibition of idolatry.

The belief of the early christian fathers is always of great authority, in testing the soundness of a doubtful doctrine; for it is to be supposed, from their communication with the apostles, that they would have the right understanding of Christ's precepts. The whole weight of this authority is in favor of our view of judicial swearing. It is certain, that, for the first three hundred years after Christ, the unlawfulness of all oaths was a prominent doctrine of the christian faith. We are told, that the usual reply of an early convert, when asked to use the oath, was "I am a christian, I do not swear." The most learned of the fathers have declared their understanding, that Christ's pre-

cept was an absolute prohibition of all oaths. Even if the terms of this precept were doubtfully expressed; or if the confirmation of the context were wanting; we should hesitate to reject an interpretation, which tradition had communicated directly from the lips of the apostles, and which Polycarp, Justin Martyr, Tertullian, Origen, Athanasius, and a host of other learned and pious fathers, have distinctly sanctioned and enforced.

With the weight of evidence, which is found against the necessity and expediency of oaths, and the overwhelming authority which exists against their lawfulness, how can we look for the ultimate continuance of a ceremony, which originated in superstition, and is preserved only from custom? We are well aware, that a form, which is sanctioned by long established usage, demands no very strong argument to sustain it; for, when truth and prejudice are weighed in the balance together, prejudice needs but a grain of reason, to make its scale preponderate. But experience tells us, that society will at length demand, that the law should be purged of all supernatural securities. These securities have one by one fallen off as society has advanced. The trial by ordeal, by wager of battle, and lastly by wager of law, or by the simple weight of the oath, unsupported by any other security, have one after the other been disused; and, the oath itself, the last of the supernatural securities, must at length give way to the simple and natural sanctions of truth.

J. L. H.

Portsmouth, N. H.

ART. VII.—ACQUISITION OF TITLE BY PRESCRIPTION.

WE propose to consider very briefly the law relating to the manner of acquiring an interest in real property by prescription; and, more particularly, the doctrines advanced

in the cases of *Ingraham v. Hutchinson*,¹ and *King v. Tiffany*,² decided in the state of Connecticut.

The foundation of prescriptive rights is the presumption, resulting from the enjoyment of an interest, that an ancient grant once existed, which from the lapse of time can no longer be produced. This presumption may be a mere fiction, the commencement of the user being tortious; but it must be observed, that no prescription can be sustained which is not consistent with such a presumption.

The subjects of prescription are the several kinds of incorporeal rights. These are unlike in their nature; and, in relation to the mode of acquiring them, an argument can seldom be drawn from one species of easement to another of a different class.

The policy of the law of prescription being to uphold an interest, which can only be sustained by virtue of a grant made at some former time, the nature of these grants and the enjoyment under them must vary with the interest to be acquired.

A right of way is an interest, which imposes an *actual* incumbrance on the land, over which it is claimed. The occupation is adverse to a full enjoyment of the property by the owner, but the possession is not exclusive, nor is it uninterrupted. A right of way may be prescribed for, though another has made use of it, and its use may be continued for a part only of the year, and to carry away the produce of a particular piece of land. But a prescription for ancient lights may be supported, although the enjoyment cannot from its nature be adverse, consisting of the natural right to the use of the elements of air and of light. The occupation must however be uninterrupted and exclusive. A prescription for common is adverse, but is founded

¹ 2 Conn. Rep. 584.

² 9 Conn. Rep. 162.

upon an enjoyment in common, and the possession is not uninterrupted. It approaches to an interest in the soil. It is the usufruct—a right to take the produce of another's land.

A prescription for a water-course, for the uses of a mill, must be exclusive, adverse, and uninterrupted. It is a possession which trenches upon the estate of another. The right is founded upon the *actual* disseisin, or upon a grant of the entire use of the water by the party prescribed against.

A right to a ferry may be prescribed for, though it commences in the natural right to carry passengers across a river for hire. Even as against the government, the exercise of the right is not adverse. When the right has been exercised a great length of time, a grant of the government is presumed, which infringes on the natural right of others to transport for hire, at the same place, or so near as to interfere with the franchise, provided that others have not exercised the same right, within certain undefined limits. In this case, the enjoyment is not of a nature to be uninterrupted. It is occasional. It is permissive by the government, and not adverse; and yet from long use a grant is presumed. It is adverse to the rights of individuals; and the franchise which thus results from prescription is exclusive.

A corporation may be prescribed for against the crown, or the government; and it may be of such a nature, as not to be held adversely or exclusively against individuals.

But no prescription can be made for an *exclusive* right, the enjoyment of which is lawful, and had in common with other citizens—as the exercise of the right of fishing in a public river—because the enjoyment is perfectly consistent with the original right. The exercise of the right of fishery is a common right; and an exclusive right may be acquired, but only by conduct which amounts to an actual exclusion and claim of right.

In the cases of prescription for common, a right of way, for a water-course, and for a corporation, the presumption is strong, that the persons over whose land it is claimed would not have submitted for so long a time to a wrongful invasion of territory, or the government to an invasion of prerogative; but in the cases of a prescription for lights, and for a ferry, there is no actual invasion of the rights of those prescribed against; but, from the manner in which the parties setting up the prescription have used the right, it is presumed that there has been an agreement, that others shall not exercise any right, which shall prejudice the new interest—"the easement and delights"—which have long been occupied.

The ferry franchise, and the use of lights, are substantive rights established by length of time. A claim of right in some appropriate manner, within the time of prescription, though it could not have disturbed the natural right, in the one case, to a full enjoyment of the elements of light and air, or, in the other case, the right of carrying passengers for hire, would have preserved the right of the adjoining proprietor, to build an obstruction upon his own land, and would have repelled the presumption of the grant of a ferry from the government. But, in consistency with the conduct of the parties, there might have been a grant; and it is not to be supposed that the house would be erected upon the boundary line, without an agreement to protect the lights which were put in; nor that for such a length of time, the ferry right would be exercised without actual authority.

In the discussions relating to prescriptive rights, nothing is more commonly to be observed than the argument, that the prescription must depend, if it can be supported at all, upon exclusive, uninterrupted, and adverse possession. It is plain, however, that there are prescriptive rights, which, in respect to their enjoyment, have not been uninterrupted,

are held in common with others, and the exercise of which is not adverse to the rights of those who are bound by them.

The true foundation of these incorporeal interests is long continued occupation and enjoyment, under circumstances implying acquiescence on the part of those, who have other interests, which conflict either directly or by consequence with the newly assumed right.

The prescription for ancient lights is founded upon the long continuance of enjoyment. There may have been a grant securing this enjoyment, and there must have been laches, in permitting quiet enjoyment, without an assertion of right. As the full exercise of the privilege cannot be protected, without a grant restraining the natural rights of the adjoining proprietor, it is clear that such a grant may be presumed in support of long possession.

It has been doubted, by a distinguished jurist,¹ whether the common law on this subject, which he considers anomalous, is recognised in this country; inasmuch as the possession is not adverse, and a difficulty attends the extent of the right. But the doctrine has been adopted in Massachusetts in the case of *Story v. Odin*;² and, as it respects the extent of the privilege or protection, it is a difficulty which belongs to this subject in common with ferries and other exclusive rights, where the limits are undefined. These it is manifest must vary with circumstances. The same rule would be inapplicable to a solitary house, and to one standing in a compactly built town.

But the case is not anomalous, as is maintained; besides the instances of a ferry above-mentioned, an ancient mill with the right of grinding may be prescribed for, where there can be nothing adverse in the enjoyment: so, an an-

¹ Judge Gould, of Connecticut. See his opinion in the case of *Ingraham v. Hutchinson*, 2 Conn. Rep. 584.

² 12 Mass. Rep. 157.

cient market may exist by prescription against the public ; and, in each of these cases, there may be an usurpation as against the public, but no adverse occupation as against a co-existing right.

From a view of the whole subject, it will abundantly appear, that the foundation of prescription is the necessity of upholding an interest, which has been exercised as if enjoyed under an actual grant, from the policy of sustaining rather than destroying rights.

An interest in a water-course may consist in : 1. A right to the natural flow of the water as it has been accustomed to run ;—2. A right by occupancy ;—or 3. A prescriptive right. A proper discrimination between these several modes of acquiring a title is important, as they are essentially different in their character and results.

1. By the doctrine of *currere solebat*, the proprietors of land, over which water flows, have a right to have the water continue to flow in the manner it has been accustomed. Proprietors above may not divert, or corrupt, or poison the current. They may make every use of the water, consistent with the rights of the riparian proprietors below. They may use the water for the purposes of husbandry, in the irrigation of land, &c.¹ so as to prevent the full use of the water below, but this privilege must be exercised within reasonable limits. The right to the flow of the water is the natural right of all the proprietors. It is a right, which can only be exerted against proprietors above, as they only can divert or obstruct the water.

2. The right of occupancy relates merely to the *power* of the water and the mode of its application. Every person, who erects a dam for the purposes of a mill, has a right to set the water back within its banks, if he do no injury to the property above.²

¹ *Weston v. Alden*, 8 Mass. Rep. 136.

² See 2 Black. Com. 403 ; *Dwight v. Hatch*, 17 Mass. Rep. 289.

The right of an occupant is founded upon these considerations. If there are several proprietors of land on a water-course near each other, any one of them, perhaps, if he could be protected in the sole enjoyment of the right, might build a dam and supply the uses of a mill, but only one of this number can exercise the right; and, as this kind of property is a species of estate of a fugitive and incorporeal nature, the absolute right is yielded to him who first occupies, in the same manner, that he is enabled to acquire the exclusive property in animals *fera naturæ*, or in property lost and without an owner. But the mere fugitive ideal right is all which he gains. If, in the use of it, proprietors above or below can show an injury to their property to the smallest extent—the flowing of meadows—the undermining of walls—or the corruption of air, by the stagnation of water—he cannot exercise this right.

It is founded upon the consideration, that no man can suffer injury by the appropriation of that, which was so evanescent that it belonged to none; which was not of a nature to be held in common or jointly—not being even so tangible and real as water itself—but which was merely a dynamic result of the flow of that element.

3. By prescription a more extended right is acquired; and that, which, even in the possession, was a mere encroachment, is confirmed. A grant is presumed in support of possession, whether that possession was originally wrongful or otherwise.

The natural right to the use of the water, and the right by occupancy, give a title to every enjoyment of the property, which is not injurious; but, by prescription, an absolute right is acquired, *as enjoyment has been*, however destructive.

In the first case, which we have cited at the head of this article, an action was brought against the proprietor of a mill above, for obstructing by a recent dam the flow of the

water to the mill of the plaintiff, which had existed beyond the time of prescription. The plaintiff founded his claim upon a prescriptive right—the presumption of a grant of the exclusive use of the water at his mill. But we cannot discern any foundation for a more extensive right, than, independent of prescription, was vested in him by the law of *currere solebat*. When he erected his dam originally, he had a right to have the water flow without any improper obstructions; and we cannot conceive how the application of the power of the water to the uses of machinery could have varied his rights.

A majority of the judges, however, though they seemed to be of opinion, that the obstruction in this case was not of a nature to interfere with the natural right to the flow of the water, were of opinion, that the plaintiff had acquired a more extended right by prescription, against the proprietors on the stream above, and that by long occupation and use of the water-course, he was entitled to the flow of the water without any interruption whatever. They were of opinion, that the use of the water for fifteen years had encroached upon the natural rights of those above.

We apprehend that there is nothing in the law of prescription, which can support such an extension of the doctrine.

In this case, the occupation was neither adverse nor exclusive. When the mill below and its dam were erected, the proprietors above had no cause of complaint, and there was no use of the privilege which was adverse to their interests. The exclusive right to the water power of the plaintiff was gained by occupancy, and was as perfect at the moment of its inception, as prescription could make it.

By occupancy the right of proprietors above and below to exercise their rights, *so as to obstruct the wheel*, was destroyed; but the right to the flow of the water, as it had been accustomed to run, continued the same, and was not

enlarged by the erection of the dam. How, then, by continuing to occupy these lawful rights, the commencement of which is shown and accounted for, did the plaintiff acquire any presumptive right, after the expiration of the time of prescription? It was supposed to result from adverse enjoyment, and is likened to a prescription for ancient lights. But there was this manifest difference, between the claim set up and a right to ancient lights. The exercise by the plaintiff, of his natural right to the use of the water, was not a newly-assumed right, requiring for its support the presumption of a grant; neither was it inconsistent with the full use at all times by the upper proprietor of all his rights to their full extent, except what had been acquired against him by right of occupancy. The same is not true of the person prescribed against for ancient lights. He cannot exercise the same right which has been assumed against him. Within the time of prescription, he may build close to his neighbor's lights; but he obstructs the lights, without gaining the easement himself. It was admitted, that there was no adverse occupation; and there was nothing even in the character of the possession, which proceeded on the ground of a grant, or which the proprietor above could consider as establishing a new right.

The plaintiff, by applying the water to the uses of a mill, could enjoy nothing more than the natural flow of the water. It was entirely immaterial to the proprietor above, whether the water was thus employed, or whether it was employed for the irrigation of the meadows below.

There can be no additional reason for a more constant flow of the water; unless the erection of a mill made the right more important and valuable.

An uninterrupted flow (which should be the consequence of a surrender of the right of the defendant to the natural use of the water), was not necessary for the support of the mill. An obstruction of the flow of the water did not de-

stroy, though it might have rendered the mill below less valuable.

But it may be said, that the defendant, having acquiesced in the plaintiff's use of the water without obstruction—his natural rights never having been exercised—cannot obstruct or divert the water in any way.

But a conclusive answer to this argument is, that the proprietor above has not lost any right by delaying to use it, unless the plaintiff below has gained the right by an enjoyment, inconsistent with existing rights above; and the enjoyment having been lawful, and consisting in the right of occupancy and the use of his natural right to the water, it cannot be extended to a larger and unlawful enjoyment; nor can a more extended grant be presumed, when the actual use is consistent with a limited construction and the preservation of the rights of the defendant.

Finally, the remedy in this case is entirely sufficient, which proceeds upon a right to the water, as it has been accustomed to flow. When the right to the use of the water is established, the law does not regard a partial diversion as an injury to the use, as when by an extension of the surface the evaporation is increased, as we have observed above; but when an improper use is made of this privilege of obstruction, every proprietor is entitled to redress, without the necessity of setting up a prescriptive right. Such a right we are clear did not exist in this case, whether an improper use was made of the natural right by the proprietor above or not.

In the next case, which we have cited for review, the controversy was between two proprietors of ancient mills on a small river.

The plaintiff rested his claim upon prescription. The defendant placed his defence upon his natural right to the use of the water and upon the right of occupancy.

The plaintiff, who was the proprietor of the upper mill,

built his dam *with a wheel of certain dimensions*, beyond the time of prescription. The ancient dam of the defendant, the proprietor of the lower mill, raised the water to within three inches of this wheel. Between the two proprietors, there was consequently a residuum of power, unoccupied.

Six years before the bringing of the action, the defendant raised his dam; and, one year before the action, the plaintiff lowered his wheel three inches.

For the obstruction of this wheel by the dam below the action was brought.

It was decided by a majority of the court (Daggett dissenting), that the action might be sustained on the ground, that the plaintiff had a right to have the flow, as it had been accustomed to flow for fifteen years.

But we apprehend, that this is an entire perversion of the doctrine, that an individual who has an interest in a water-course has a right to have the water flow, *ut currere solebat*.

This right relates, as we have already observed, to obstructions and diversions of the stream above; and is a natural right not dependent upon prescription. A proprietor of land can have no interest in the flow of water, which has passed him.

However injurious an obstruction below may be, whether by flowing meadows, or by corruption of the air, the party injured has not a right to an abatement of the nuisance on that ground. The injury is consequential; and, if it is made to cease, the obstruction may be continued. On the other hand, the right to the flow of the water from above is positive, and cannot be invaded.

The true doctrine as applicable to this case is, that the plaintiff is entitled *to use* the water, as he has been accustomed to use it during his occupancy.

The grant to be inferred from the possession of the plain-

tiff was not an unlimited grant of a mill and of the water for its use. Neither in the construction of this ideal grant, is there, as in other cases, to be a liberal construction as against the grantor; but the grantee having taken possession, and put his own construction upon it, it is rather to be inferred, that his occupation is to the full extent of his right. Possession being the only and precise evidence of title, all presumption is to be in favor of the grantor or person prescribed against, so far as there is any room for doubt.

The rights of the parties were originally concurrent. The defendant might exercise his natural right, except as it was already appropriated. The subject may therefore be viewed in the same manner, as if by his dam he had originally occupied the whole right, and thrown back the water precisely so far as he might have done, without injury to the plaintiff's mill. What restrained the right to build a dam and set the water back, within its banks? Not the dam above, for that affected not the rights of the parties. It neither encroached upon the defendant's right, nor could any exercise of those rights affect the dam itself. The plaintiff had a perfect right to build his dam, at the moment it was erected. The incorporeal right resulting was distinct. This was but a legitimate exercise of his property in the land; and could only affect the easement of those above, but not that of the defendant below.

What then has the plaintiff acquired against the proprietor below? He can have acquired nothing but by the use of his wheel, and to this the presumption of a grant relates.

The question then recurs, what grant is to be presumed. Shall it be one, which is *unnecessarily* restrictive of the rights of the plaintiff, or which precludes improvements in machinery or the mode of propulsion? Undoubtedly not; unless the proposed improvements infringe the rights of others. And the very statement of the case and the bringing of the suit shows, that the enlargement of the wheel in this case was injurious.

In *Luttrell's case*,¹ a man prescribed for a water-course for a mill, and it was said by the court, "he might alter the mill into what kind of mill he pleased, provided always that no prejudice should thereby accrue, either by diverting or stopping the water as it was before." It could be of no importance to the proprietor below, whether he used the mill for a fulling mill, or for the grinding of wheat, or for any other purpose; and therefore it might be inferred, that the grant prescribed for contained no such restriction as was contended for in *Luttrell's case*.

Such a restriction being in derogation of the right itself, can only grow out of the nature and extent of the possession. But it appears from that case, that the change proposed must be such as does not prejudice the party prescribed against.

So, in the case of *Newman v. Anderson*,² the plaintiff, the owner of an ancient mill, put in a wheel of different dimensions, but requiring less water—the level of the water continuing the same—and Abbot, justice, puts the right of making alterations on the ground, that they shall not injure the rights of the lower mills, and justifies the change in the dimensions, as an improvement, which is by no means injurious, because the new wheel draws no more water than the old one.

This then is the extent of the prescription of the proprietor of the upper mill, that he may use the wheel as he has been accustomed to do for fifteen years, and make such alterations in the mill, or in the shape of the wheel, as might be done by way of improvement, without injuring the rights of the owner of the lower mill.

The only part of the plaintiff's structure, which could receive injury from the encroachments of the defendant below, was the wheel; and, if an actual grant had been sought

¹ 4 Coke's Rep. 47.

² 1 Barn. & Ald. Rep. 258.

from the defendant, protective of the rights above, it would have been an agreement not to flow back the water upon the existing wheel. What necessity is there of going further to presume an agreement, that the defendant should not make use of the water not appropriated by the mill above? Is it because the value of the mill is greater, if the privilege of building a larger wheel is preserved? But the value is not obtained without taking to an equal degree from the mill below. It is a fallacy to call the change an improvement. It is not an improvement, but an encroachment merely. Every inch added to the wheel is to be deducted from the dam below.

A prescription, for an improvement of the dam by way of enlargement, might as fairly be made against the wheel above, as this which is sustained in favor of the wheel against the dam below. It is a question of quantity. If the proprietor of the mill above has a wheel of certain dimensions, a grant is to be presumed to that extent; and the owner of the mill below may throw the water back to the verge of the wheel. The effect of an extension of the right makes it a prescription to cut off three inches from the dam below. But this constructive prescription is unknown to the law. There must be an actual user; an enjoyment correlative to the presumed grant, of which the only evidence is the enjoyment. Even if the owner of the mill below had no greater right than the proprietor above, to the water between them, except so far as actually occupied, then there is a certain amount of water power, which was never occupied by either, until, as appears by the statement of the case, within six years before the bringing of the action, when the dam of the mill below was raised. It is, then, the right of the first occupant, and thus the plaintiff is excluded.

The right of the plaintiff is merely that of occupancy. The actual appropriation is determined by possession. From

the nature of the right nothing can be derived from intendment; no enlargement of right can result from construction. The proprietor below has the same right of occupancy to the extent not appropriated, and he may throw the water back by the dam to the wheel itself, provided he do not interfere with actual occupation.

Such is the state of things at the commencement of the right of occupancy, and prescription cannot vary it.

Prescription is founded upon occupancy. It strengthens possession when this is lawful, and establishes a right commencing in wrong. Prescription can have no effect by way of extension, when the commencement is shown to have been lawful, as in this case where the right of occupancy gives the plaintiff a title.

The right to the water, as it has been accustomed to run, is subject to the right of others in the same water; a consideration which seems to have been too little regarded by the court.

The argument of the court is founded upon a prescription of fifteen years, which they suppose confers as full a right to every privilege incident to a mill, as *could have been granted* consistently with the enjoyment; and not that possession is itself the evidence, as well as the result of title; and herein the fallacy consists. The inquiry has not been, what may be presumed from the actual occupation; but what is the most beneficial construction of the plaintiff's rights.

The consideration, that both parties originally stood on an equal footing as occupants, seems to be disregarded; and it is supposed, that nothing can be gained by the proprietor below against the mill above, but by prescription.

It might as well be assumed, that, because the mill below was established by prescription before the other mill, therefore, the owner had a right to raise his dam to the injury of the mill above, because it would be an improvement and render the mill more valuable.

But if we have regard to the grant, which may be presumed against the defendant, the proprietor of the mill below, we must either suppose an agreement not to set back the water on the wheel above, or an agreement by the defendant not to raise his dam higher than it was at the time of the grant. The possession is consistent with the former supposition, and there is nothing to support the latter, further than the consideration, that it is a construction more beneficial to the upper mill; but, it appears from the dimensions of the wheel adopted, that it was not considered as more beneficial at the time when the right commenced; and it cannot be presumed that the owner of the lower mill granted a restriction on himself, which was not beneficial to the upper mill.

On the whole, the decision of the court seems to have been erroneous, in adopting a construction more extensive than was supported by the occupation, which was the evidence of title, and in a false application of the doctrine, that riparian proprietors have a right to have the water flow *ut currere solebat*.

S. F. D.

ART. VIII.—ADAMS'S ELEMENTS OF MORAL PHILOSOPHY.

Elements of Moral Philosophy. By the Rev. Jasper Adams, D. D., President of the college of Charleston, South Carolina, and (ex officio) Horry Professor of Moral and Political Philosophy; Member of the Royal Society of Northern Antiquaries, at Copenhagen; Member of the American Academy of Arts and Sciences, at Boston, &c.
 “Nulla enim vitæ pars, neque publicis neque privatis, neque forensibus neque domesticis in rebus: neque si tecum agas quid, neque si cum aliquo contrahas, vacare officio potest: in eoque colendo sita vitæ est honestas

omnis, et in negligendo turpitudine." Cicero, de officiis, lib. i. c. 2. Cambridge. Folsom, Wells, and Thurston, Printers to the University. 1837.

THE great length of the title page of this book would have deterred us from copying it in full, but for the single consideration, that, as it is mainly devoted to setting forth the titles of the author, rather than the title of his work, our readers may perhaps be thereby enabled to conjecture the sort of title, which the book itself has to their attention and respect; for we are well persuaded, that much may be learned of the character of a work, by the manner in which the author introduces himself and it to the public. Mr. Adams appears before us, with a book entitled the "*Elements of Moral Philosophy*," and invites our attention to his learned labors, by announcing himself as a reverend doctor of divinity, president and professor of a college, member of several literary and scientific associations, &c.; the intention of all which undoubtedly is, not merely to single out and identify the author from all the other supposable Jasper Adamses in the world, but to intimate that the production of so distinguished a personage is entitled to a corresponding degree of respect:—a sort of self-laudation, which, like an attempt to lift one's self by one's own waistband, may perhaps attract some notice of the passers-by, but is little likely after all to result in any very exalted or permanent elevation.

The first title of Mr. Hoffman's *Course of Legal Study* is devoted to Moral and Political Philosophy; the study of which should unquestionably precede as well as accompany that of positive law and jurisprudence; and we sincerely wish, that, among the numerous works on these subjects, there were any, which we could cordially recommend to the student of American law as text-books. But such is not as yet the case. We know of no single work on either of these topics, upon which we would advise the American

student to rely. Very many valuable and interesting works, there certainly are, on moral and political philosophy; but none, we repeat, which are entirely adapted to aid in forming the mind and character of the American lawyer and statesman.

The work, whose long title we have above given, is not in our opinion calculated to supply the deficiency to which we have alluded. It consists almost entirely of a compilation of the thoughts and reasonings of those authors, who had previously written on the various topics, which, in the aggregate, Mr. Adams denominates the elements of moral philosophy, with here and there what purports to be an idea of his own. The work contains no theory of morals;—it has nothing like organic unity;—and we find in it no systematic and orderly developement of its various parts. The whole book, as it seems to us, is made up, to use the author's own language in reference to two of his chapters, "of an abridgment of the language and a condensation of the thoughts," of other authors. We would not be understood to say, that it contains nothing of an original character. This would be a great mistake. The author occasionally shows himself, and in a manner, which leaves no doubt of his identity.

Mr. Adams observes in his preface :

"The science of practical morals is not stationary, much less is it incapable of advancement. Like other sciences, it depends in a certain degree on experience, and successive writers ought to aim to collect, and register in their works, the well matured results of this experience. This volume seems to me to contain a considerable number of new results of this kind." p. x.

Of the "results" alluded to in the last sentence of the above paragraph, we have found but one, that seems to us decidedly novel; and that is so curious withal, and, if we mistake not, so characteristic of the author, that we cannot refrain from communicating it to our readers. The third

chapter of Mr. Adams's sixth part is entitled "Intemperance in Drinking," which the author candidly acknowledges, in a note at the end, "consists principally of an abridgment of the language and a condensation of the sentiments of Dr. Beecher's 'Six Sermons on Intemperance.'" Mr. Adams concludes his note, however, by the remark, that he "has confined himself in this discussion to the use and sale of *distilled liquors*;" and, that "the question respecting the use of wine, beer, &c. he considers beyond the 'Elements of Moral Philosophy,' to which he proposes to limit himself." The doctrine, that the use of wine, beer, &c. is beyond the elements of moral philosophy, is certainly entitled to be called a "new result;" and no moralist, we presume, will venture to contest the honor of its discovery with Mr. Adams. We only regret, that he did not see fit to develop and explain, instead of merely hinting at this "new result," which, if well-founded, must be susceptible of extensive application in the temperance reformation. With our present light on this important and interesting subject, we are wholly unable to perceive why the use and sale of distilled liquors should, and the use and sale of fermented liquors should not, be deemed to come within the province of a work purporting to treat of the elements of *moral* philosophy. We commend the matter to our temperance friends, for their most serious consideration; and, in the mean time, we comfort ourselves with the hope, that the use and sale of fermented liquors may possibly belong to the other branch of Mr. Adams's professorship, and that it will consequently be discussed in his (presumed to be) forthcoming work on the elements of *political* philosophy. We would not be so uncharitable as to suppose, that this nice philosophical distinction between distilled and fermented liquors is at all to be attributed to the author's sincere wish, expressed in his preface, "to avoid giving just cause of offence to any individual or to any body of men;" but we cannot help sus-

pecting, that, if Mr. Adams had published his book twenty or even ten years ago, he would have had strong doubts, whether the use and sale of distilled liquors were not beyond the elements of moral philosophy.

Mr. Adams has undertaken to bring the law to his aid. We agree with him, that "moral philosophy has important relations to and connections with law;" but (we are sorry to say) the latter is now so technical and artificial in its character, that its relations and connections with the former cannot be well comprehended or expounded, by one not professionally learned in the law; and it is no disparagement to Mr. Adams, whatever it may be to his work, that he has not been eminently successful in this part of his undertaking. We have already pointed out one of the "new results," to which our author has been fortunate enough to attain, in reference to the elements of moral philosophy. His discoveries in the law, of which we propose to afford our readers a specimen, are equally happy and important. In the chapter, "On the Observance of Contracts," Mr. Adams considers the question, how far it is the duty of a seller to disclose defects in the things which he sells, and, after stating the common law, he proceeds as follows :

"On this subject, the civil law, as stated by the learned and accurate Pothier, which is the law of the greatest part of continental Europe, and the basis of the code of Louisiana, is rather more severe in its requisitions, than the common law of England, or of the United States. He says, 'Although in many transactions of civil society, the rules of good faith only require us to abstain from falsehood, and permit us to conceal from others that which they have an interest in knowing, if we have an equal interest in concealing it from them, yet in interested (pecuniary) contracts, among which is the contract of sale, good faith not only forbids the assertion of falsehood, but all reservation concerning that, which the person with whom we contract has an interest in knowing, touching the thing, which is the object of the contract.' " p. 218.

The above extract from Pothier is taken at second hand from a translation of a portion of the second chapter of the first part of his treatise on the contract of sale, which is inserted in a note on page 185 of the second volume of Mr. Wheaton's Reports; and, with the exception of a single word interpolated by Mr. Adams (which we shall notice immediately), is correctly transcribed. The preliminary remark of Mr. Adams, however, contains, or rather implies, an error of some importance, which he would never have fallen into, if he had read the treatise on the contract of sale, or even the whole of that part of it translated by Mr. Wheaton. Mr. Adams says, that this extract expresses the civil law on the subject of disclosures by a seller, as stated by Pothier; and that it is the law of the greatest part of continental Europe, and the basis of the code of Louisiana. The first part of this statement is correct. The doctrine of the extract from Pothier is undoubtedly that of the Roman lawyers, whose writings make up the digest. But it is not the law of any part of continental Europe, or of the state of Louisiana; nor was it stated by Pothier to be the law either of France or of any other country, at the time when he wrote. This justly celebrated author was, at the same time, a moralist and a lawyer. His treatises on obligations and contracts are not only books of law, but of morals; and, in treating the various subjects embraced under those general heads, he considers them, as he himself expresses it, according to the rules of the forum of conscience, as well as of the exterior forum, or, in other words, both in a moral and a legal point of view. That part of the treatise on the contract of sale, in which the above extract occurs, is the second chapter of the first part, where the author considers those of the engagements of the seller which result from good faith. This chapter is divided into four articles; 1. What disclosures the seller is bound *in conscience* to

make; 2. What disclosures he is bound *in law* to make; 3. Whether he is bound, at least in conscience, to disclose extrinsic circumstances; and 4, Whether the seller may, in good conscience, sell for more than the just price. In considering the question stated as the subject of the first article, Pothier expresses himself in the language quoted by Mr. Adams, and cites, in confirmation of his doctrine, the opinion of the Roman lawyers. But when he comes to consider the subject of the second article, namely, what disclosures the seller is bound *in law* to make, he expresses himself as follows :—

“ Though it is in reference to the exterior forum, that the Roman juriconsults established the principles above stated, touching the obligation of the seller, to suppress nothing from the buyer, which concerns the thing sold, and though these principles ought to be strictly followed in the forum of conscience; *yet we pay little attention to them in our tribunals*, in which a buyer is not easily allowed to complain of the concealment of a defect in the thing sold, unless such defect is redhibitory; the interests of commerce not permitting parties to set aside their contracts with too much facility, they must impute it to their own neglect, that they have not better informed themselves of the faults which the thing sold might have.”

It is manifest, therefore, that, in the extract quoted by Mr. Adams from Pothier, that “learned and accurate” author is not declaring the rule of law, but the rule of conscience, in reference to disclosures by the seller. The rule of law, he says, precludes the seller from concealing those defects only which are denominated redhibitory, or, in other words, which authorize the buyer to rescind the contract and return the thing. Redhibitory defects are those which render the thing useless, or nearly useless, or injurious, for the purposes for which it is destined. If our readers will call to mind the very great extension, which the common law has received in modern times, by means of the doctrine

of implied warranties, and will take the trouble to compare this doctrine, with the rule above stated of the modern civil law, which prevails in "the greatest part of continental Europe," and constitutes "the basis of the code of Louisiana," they will perceive, that the latter is very little if at all "more severe in its requisitions than the common law of England and of the United States." If Mr. Adams's book should chance to fall into the hands of a New Orleans merchant, we fancy he will be somewhat surprised to learn, that when he sells an article, he is bound by law to disclose to the buyer every circumstance within his knowledge, relating to the thing sold, which the latter has an interest in knowing.

We observed above, that the extract from Pothier, quoted from the note in Wheaton, was correctly transcribed, with the exception of a single word, interpolated by Mr. Adams. The word "pecuniary," included in the parenthesis in the ninth line, does not belong to Pothier; nor is it to be found in the translation of Mr. Wheaton; but is inserted by Mr. Adams, evidently for the purpose of explaining what he supposes Pothier to have meant, by the term "interested contracts." The contract of sale, says Pothier, belongs to the class of "interested contracts;" which, says Mr. Adams, are the same thing as "pecuniary" or money contracts. According to Mr. Adams, an "interested" contract, such as is intended to be referred to by Pothier, is a "pecuniary" one; and, consequently, a contract, which is not "pecuniary," does not come within the rule. A pecuniary contract may be defined to be one, in which money actually paid, or contracted to be paid, constitutes one side of the bargain. Mr. Adams's definition thus leads to the remarkable conclusion, that, by the civil law, "which is the law of the greatest part of continental Europe, and the basis of the code of Louisiana," the seller of a horse for a sum of money is bound to disclose every circumstance, which the buyer has

an interest in knowing, but if instead of a sum of money he receives a quantity of grain as the price, he is under no such obligation. A moment's reflection, we should think, would have been sufficient to save the author from the absurdity of giving "pecuniary" as the synonyme of "interested." This definition not only shows that Mr. Adams was somewhat hasty in judgment, but that he was most profoundly ignorant of the author, whom he pretended to quote with so much confidence and familiarity; and this ignorance is the more inexcusable, from the fact, that the means of its correction must have been accessible to the author, in the treatise "On Obligations," which has now been many years before the public in an English translation. In that work, Pothier considers the subject of contracts and agreements in general; and, in his treatises on particular contracts, the general principles established in the former are applied and developed. All these treatises, in fact, constitute but a single work. If Mr. Adams had looked into the treatise on obligations, he would have seen that Pothier makes five divisions of contracts, the third of which includes the class in question. The following extract from the Treatise on Obligations (no. 12), will explain what is meant by "interested contracts."

"The third division of contracts is into contracts of mutual interest, contracts of beneficence, and mixed contracts.

"Contracts of mutual interest are divided into commutative and aleatory. Commutative are those, in which each of the contracting parties receives an equivalent for what he gives; as, in the contract of sale, the seller ought to give the thing sold, and receive a price, which is the equivalent; the buyer ought to give the price, and receive the thing sold, which is the equivalent. These contracts are divided into four classes, viz.: *do ut des, facio ut facias, facio ut des*, and *do ut facias*.

"Aleatory (or hazardous) contracts are those by which one of the contracting parties, without contributing any thing on his

part, receives something from the other, not by way of gift, but as a compensation for the risk which he runs. All games of chance, wagers, and contracts of insurance, are contracts of this description."

Our readers will now understand what an "interested contract" is, and will be in a situation to appreciate the sagacity of Mr. Adams's conjectural explanation of the term. In concluding our criticism of Mr. Adams's book, we will only suggest to him, when the second edition shall be published, to correct the inaccuracies, which we have above pointed out, and some others which he will discover upon a close examination. We hope he will also take the same opportunity to enlarge the fourth chapter of his fifth part, entitled "The moral influence and duties of men of letters," by considering how far it is the duty of a compiler to state accurately the doctrines of those authors from whose works he borrows; and also the general duty of an author to get before-hand a thorough knowledge of the subject upon which he proposes to write, and to bestow as much time and labor upon his work, as may be needful to make it intelligible and satisfactory to his readers. We have a perfect conviction, that these matters are not "beyond the elements of moral philosophy;" and we can assure Mr. Adams (without meaning to allude to his work as an example), that there never was a time in the history of letters, when the duties of "men of letters" in these respects were more necessary to be set forth than at this moment.

Mr. Adams's work falls within our cognizance, so far only as it is connected with the study of jurisprudence; and it is in that connection alone, that we have pronounced our critical judgment upon it. A writer, in a late number of the London and Westminster Review, remarks, that "we, in our days, are privileged with logic, systems of morals, professors of moral philosophy, theories of moral

sentiment, utilities, sympathies, moral senses, not a few; useful for those that feel comfort in them;"—and, to those who may chance to "feel a comfort" in compilations like the work before us, we heartily commend Mr. Adams and his *Elements of Moral Philosophy*.

ART. IX.—PROUD'HON ON PUBLIC DOMAIN.

Traité du Domaine Public, [A Treatise on Public Domain]
par M. Proudhon, Doyen de la Faculté de Droit de
Dijon. Dijon, 1834. 5 vol. in 8vo.

[Abridged from an article by Mr. Paul Royer-Collard, in the *Revue de Législation et Jurisprudence*, vol. i. p. 454.]

WHEN Mr. Proudhon published his *Treatise on Usufruct*, in 1823, he announced another treatise on the law of property and the division of goods, intended as a sequel to his work on the state of persons. He has now begun to fulfil his promise to the public, and the treatise before us accomplishes a part of his engagement.

In examining the fundamental division of things, Mr. Proudhon found, that, before entering upon the examination of individual rights, it was necessary, in the first place, to take a view of all those things which remain in the state of primitive indivision, or which, for the sake of the common utility, are put into that state; and it thus became manifest to him, that the public domain must be first treated of, before treating of private property.

The word, domain, says the author, corresponds to the idea of the power, which man exercises over the things subjected to his power. Consequently, we distinguish three kinds of domain, namely, sovereign domain, public domain, and private domain.

It has been too common not to distinguish the public domain from the domain of the state; and the greater number of the jurisconsults, by confounding these two expressions, have been led into inevitable errors. The state, as well as individuals, may have a right of private property in certain things. The mode of acquiring and of enjoying, the cases of alienation, and, in a word, every thing which withdraws these kinds of goods, from the law common to all kinds of property, are regulated by special laws. But, by the side of these goods, which constitute what we call the domain of the state, we find other things, which, by their essence or their destination, are exclusively consecrated to the service of the entire society, without being susceptible of becoming the property of any one individual; such as public highways, roads, navigable rivers, &c. These are the things which compose the public domain. The government, therefore, which, in regard to the domain of the state, exercises all the rights of an ordinary proprietor, has a tutelary or administrative authority only, over the public domain. Mr. Proudhon has perfectly succeeded in indicating the difference between these two kinds of domain, and in pointing out the errors, to which a neglect of it has led even the compilers of the laws. This distinction being once well established, it becomes perfectly easy to comprehend the principle, so often repeated, of the inalienability of the public domain. How is it possible to suppose that navigable rivers, consecrated by their very nature to the service of all, can come within the domain of one? How is it possible to suppose that portions of territory, converted into roads, or fortifications, &c., can belong to an individual, so long as their primitive destination to the public utility remains? But, on the other hand, it would be impossible to say, that the abandoned bed of a river, a discontinued road, the materials of a dismantled fortification, or goods which have devolved

upon the state by a forfeiture, or otherwise, are so withdrawn from the ordinary class of things, that their alienation ought to be for ever interdicted. Inalienability and imprescriptibility, therefore, apply only to the public domain; but, as to its own domain, saving and excepting the provisions of some special laws, the state will be subjected in principle to the same rules, and especially to the same prescriptions, as individuals.

These considerations also lead us to admit a similar distinction, in regard to the rights of communities. Communities, which are special societies in the state, may have rights of property over certain things, movable or immovable; and, under this point of view, we ought to apply to them, saving the particular regulations to which they may be subjected, the principles above established in regard to the domain of the state. But the territory, or the boundary of the community, the communal or vicinal highways, the streets and public places, the churches and the vessels consecrated to the purposes of worship, the cemeteries, &c., are evidently fractions of the public domain, at least during all the time in which their destination remains unchanged. The community may be invested with the oversight and administration of these different things; but they do not thereby lose their character of the public domain; or, in other words, they are nothing more than local fractions of the public national domain; but the foundation of the right is always the same in both cases.

These distinctions between the public domain and the domain of the state, the municipal domain and the domain of the community, in short, between the public national domain and the public municipal domain, are evidently of the highest importance. But they have been scarcely hinted at, even obscurely, by any of the authors who have written on this matter; and if Mr. Proud'hon were entitled only to the merit of indicating them in a clear and palpable

manner, he would have rendered an immense service to the science of the law. Now, there is no more doubt or uncertainty; the apparent contradictions are removed; a preliminary question must always be considered; but from the discussion of this question, the solution of every administrative or judicial contestation, in which the state or communities may be engaged, will necessarily result.

The Treatise on Public Domain is divided into two parts. The first two volumes contain the general principles, and an enunciation of every thing which relates to the government of the public domain, national or municipal; the three last volumes are entirely devoted to the subject of water. This interesting matter is presented in the greatest detail by Mr. Proud'hon. He examines successively the use of territorial seas and their banks, that of rivers, whether navigable or otherwise; nothing indeed escapes his investigation.

The work is concluded with an exposition of the laws concerning common, salt, warm and mineral springs; concerning marshes, and the draining of them; and, in passing, he throws out some considerations concerning subterranean waters, the use of which has become so important for the purposes of agriculture, especially since they have been so happily turned to account by means of Artesian wells.

One point, to which the attention of the author is naturally drawn, is the question, what we ought to understand in our law by the bed and the banks of a river, and how the property and use of them ought to be regulated.

Among the Romans, notwithstanding some texts, which must be considered rather as enunciative than dogmatic, it seems certain, that the bed of a river was perfectly distinct from the running water. This running water, *aqua profluens*, was what the jurisconsults designated as a common thing; but if the river insensibly retired, and thus uncov-

ered a part of the soil upon which it had run, if it left bare an island in the midst of its channel, if it even changed its bed, the proprietors of the banks immediately occupied the alluvial land, the island, or the abandoned channel. It seems that the proprietors of the ground were subjected, by a kind of servitude, to allow the water to run which came naturally upon their ground, but without thereby losing the property of the ground covered by it; and, for a stronger reason, the proprietors of the banks preserved the property of the banks, though they were bound to allow navigators the use of them. In France, however, a contrary system has always prevailed. The river has been considered as inseparable from its bed, and the latter has been subjected to the public service as well as the running water; and hence the consequence, that, in rivers, at least in those, which, by the agreement of all, are included in the public domain, the islands which are formed belong to the state; and the alluvial lands do not accrue to the proprietors of the banks, except where they are entitled by a particular right of accession. But what portion of the ground is it, which must be considered as forming the bed of the river? Is it only that, which is actually covered by the water, even when the water is low, so that the property of the bank proprietors increases or diminishes according as the level of the river is more or less elevated? Do the banks of the river belong to the state and to what extent? Where does the alluvion commence which accrues to the advantage of the proprietors of the banks?

The remainder of the article, from which we have compiled the foregoing notice of Mr. Proudhon's Treatise, is principally taken up with a discussion of the questions above indicated, which would not probably be of much interest to our readers. The work, as a whole, is highly commended.

The distinction between things which are the property of

the state, and those which are only in the custody and administration of the state, for the use and benefit of the whole society, is a most important one; and, if possible, more important to be known and understood in this country than in any other. If we do not greatly mistake, though susceptible of a direct application in the case of the Charles river and Warren bridges, decided by the supreme court last year, it was not so much as alluded to, throughout that most vexatious and protracted controversy, either by the counsel or by any member of the court. The various other subjects, treated of by Mr. Proud'hon, we should think would also give his work a considerable value for the jurists of this country.

L. S. C.

JURISPRUDENCE.

I.—DIGEST OF AMERICAN CASES.

Selections from the following reports, viz.—2 Sumner (U. S. First Circuit); 3 Fairfield (Maine); 10 and 11 Connecticut; 16 Wendell (New York); 1 Baldwin (U. S. Third Circuit); 7 Vermont; 6 Gill and Johnson (Maryland); 1 Wharton; 4 and 5 Watts; and 1 Miles (Pennsylvania); 1 Harrington (Delaware); 2 Blackford (Indiana); 3 Dana (Kentucky).

ACCIDENT.

(*Unavoidable.*) No action of trespass can be maintained, where the injury complained of results from unavoidable accident, and no blame is imputed to the person doing the injury. *Vincent v. Stinehour*, 7 Vermont, 62.

ACCORD.

(*Agreement varying original contract.*) An agreement to pay a less sum of money, and to deliver goods in discharge of a greater sum owing and payable, must be fully executed, and the money and goods accepted in satisfaction thereof; otherwise it is no extinguishment of the original debt. Accord, in such cases, forms no bar to a recovery on the original cause of action, and cannot be pleaded for that purpose. *Spruneberger v. Dentler*, 4 Watts, 126.

ACTION.

1. (*Negotiable note.*) If a negotiable note be given for goods which had been previously sold and charged to the purchaser,

a recovery cannot be had on the original contract, without the note, or satisfactorily accounting for its absence or loss. *Hays v. M'Clurg*, 4 Watts, 452.

2. (*Husband and wife*.) An action cannot be maintained against a husband alone, without an express assumption, for services rendered to, or money expended for, his wife *dum sola*. *Carl v. Wonder*, 5 Watts, 97.
3. An action at common law cannot be maintained against a husband and wife, by the guardian of the wife, *dum sola*, to recover compensation for his services as guardian, or money expended by him for his ward: his remedy is in the orphan's court. *Ib*.
4. (*Plaintiff may bring, without performance*.) If an action for an escape be brought in debt, the jury, if they find for the plaintiff, must find the whole debt and costs; but if brought in case, they may find such damages as they think proper. *Duncan v. Klinefelter*, 5 Watts, 141.
5. (*Against an attorney for negligence*.) To an action brought by A against B, an attorney at law, for negligence in not instituting a suit against C, to recover a debt due by C to A, it is a good defence that the debt was not really owing by C to A, but to another person at the time when the defendant was retained to institute such suit. *Jackson v. Tilghman*, 1 Miles, 31.
6. (*Discharge under the insolvent law of another state*) A discharge under the insolvent law of the state of Maryland is not a bar to a recovery on a cause of action existing previous to such discharge, where the plaintiff, at the time of the contract and the institution of the suit, is an alien and foreign subject. Nor is the discharge a bar to an action on a judgment recovered on the same cause of action in the circuit court of the United States in Maryland. *Hobblethwaite v. Batturs*, 1 Miles, 82.

ACTION ON THE CASE.

1. (*Measure of damages*.) Where one wrongfully diverted water from the plaintiff's mill, the latter being the lawful owner of the stream, such wrongdoer was held to be answerable in nominal damages, though no actual injury to the plaintiff's mill resulted from the act complained of. *Butman et al. v. Hussey*, 3 Fairfield, 407.

ACTIONS REAL.

1. (*Seisin.*) In a writ of right, the demandant may count as well upon his own seisin as upon that of his ancestor. *Copp v. Lamb*, 3 Fairfield, 312.
2. (*Eviction.*) A grantee may be evicted though he has never been in the actual occupation of the land. *Curtis v. Deering*, 3 Fairfield, 499.

ACTION—RIGHT OF.

(*Voluntary services.*) No action will lie to recover compensation for services performed, where with a view to a voluntary legacy, the services were rendered by the plaintiff without any expectation of being paid the value thereof, or any promise of remuneration, expressed or implied. *Lee v. Lee and Welch*, 6 Gill and Johnson, 309.

ADMINISTRATOR.

(*Limitation.*) A promise by an administrator will revive a debt barred by limitation. *Bennington v. Parkins's administrator*, 1 Harrington, 128.

ADMIRALTY.

1. (*Pleadings.*) In a libel for a maritime trespass, assault and battery, against two respondents, if there is a joint decree for damages, either of the respondents may appeal without joining the other, where the respondents have severed in their pleadings or answers, or jointly pleaded a negative plea in the nature of the general issue. But it seems otherwise, if they had pleaded a joint justification. *Thomas v. Lane*, 2 Sumner, 1.
2. (*Jurisdiction.*) The admiralty jurisdiction as to torts depends upon locality, and is limited to torts committed on the high seas, or at farthest to torts committed on waters within the ebb and flow of the tide. *Ib.*
3. (*Same.*) It seems that torts committed on tide waters within foreign ports are within the admiralty jurisdiction. *Ib.*
4. (*Receipt by a seaman.*) A receipt by a seaman on receiving the sum due to him for wages, stating that it is in full for all services and demands for assault, battery, and imprisonment, &c., against the owner, and officers, is no bar to a suit for an assault, battery, and imprisonment. And if it were, it

could not avail the party, unless specially relied on in the answer as matter of defence. *Ib.*

5. (*Effect of suit in state court.*) A suit in a state court by replevin, or by an attachment of the property in question, cannot supersede the right of a court of admiralty to proceed by a suit *in rem*, to enforce a right or lien against the property. *Certain Logs of Mahogany*, 2 Sumner, 589.

ADMIRALTY JURISDICTION.

1. (*Account for provisions.*) An account for provisions furnished to the owner or commander of a vessel, or for articles for her use when not on a voyage or in a foreign port, is not within the admiralty jurisdiction of the district court, either as a substantive distinct claim or as an off-set to a libel for seamen's wages. *Bains v. The Schooner James and Catherine*. 1 Baldwin, 545.
2. (*Meaning of.*) Admiralty jurisdiction is referred to in the constitution as it was restrained by the statute and common law in England before the revolution, and as it was exercised by the state courts before the adoption of the constitution. *Ib.*
3. (*Same.*) The rules which regulated it and the cases where it can be exercised, considered libels for seamen's wages, as held in England, not to be within the statutes which restrain the jurisdiction of the admiralty, either as being excepted cases or as coming within the rule of *communis error facit jus*. *Ib.*
4. (*Maritime contracts.*) Contracts of seamen for maritime service are in effect maritime contracts, governed by the maritime law, which prescribes the rights and obligations of the parties differently from the common law. *Ib.*
5. (*Same.*) In the United States they are regulated by the act of 1790, which gives seamen a right to proceed in the admiralty for the recovery of their wages. *Ib.*
6. (*Exclusion of.*) The seventh amendment to the constitution excludes the jurisdiction of admiralty over contracts regulated by the common law; suits upon such contracts are appropriately "suits at common law" within the terms of the amendment, and are cognizable only in courts of common law. *Ib.*
7. (*Set-off in.*) No off-set is allowable on a libel for seamen's wages, unless it be a payment on account thereof. *Ib.*

AGENT.

1. (*Payment to.*) Where an agent authorized to sell lands and receive payment therefor according to his discretion, upon a sale thereof takes a note and mortgage in his own name, upon which he receives a horse in payment, the horse immediately becomes the property of the principal. *Waldo v. Peck*, 7 Vermont, 434.
2. (*Acts of.*) The acts of an agent in the general course of his employment are evidence against his principal, without proof that they were done by his orders. *Waples et al v. Waples*, 1 Harrington, 474.
3. (*Directions of.*) The directions of an agent of a company in relation to their business, and his declarations at the time of giving such orders in relation thereto, or to their business generally, being part of the *res gesta*, are evidence against the company; but his general declarations, conversation, or letters not immediately connected with or growing out of the discharge of his agency, are not evidence. *Randel v. The Ches. & Del. Canal Company*, 1 Harrington, 234.

ALIEN.

1. (*Party.*) An alien resident in New Jersey, who holds land under a special law of that state, may sustain a suit in the circuit court relating to such land. *Bonaparte v. The Camden & Amboy Railroad Co.*, 1 Baldwin, 216.
2. (*Same.*) When an alien sues a corporation, it is no objection that one of the stockholders is also an alien, if the agents of the corporation are also defendants. *Ib.*
3. (*Feme covert.*) A *feme covert*, who is an alien, may be naturalized without the concurrence of her husband. *Priest v. Cummings*, 16 Wendell, 617.
4. (*Same.*) Her naturalization, however, does not entitle her to dower in lands of which her husband was seized during coverture, and which were aliened previous to her naturalization. *Ib.*
5. (*Dower.*) A *feme covert* is not barred of her right of dower, by joining with her husband in the conveyance of lands, and acknowledging her execution of the deed before an officer authorized to take such an acknowledgment, if she be a minor,

within the age of twenty-one, at the time of the acknowledgment. *Ib.*

ALTERATION.

1. (*Effect of, in written instrument.*) An alteration of a written instrument, by a stranger, though material, will not render such an instrument inoperative. *Nichols v. Johnson*, 10 Conn. 192.
2. (*Same.*) An alteration of a written instrument, which does not vary its meaning, by a party claiming under it, or by virtue of it, will not destroy it. *Ib.*

ANNUITY.

- (*Interest.*) Interest may be recovered on the arrears of an annuity given in lieu of dower. *Beeson's ex'r. v. Beeson's adm'r.*, 1 Harrington, 106.

ASSETS.

1. (*Evidence of.*) Showing the administrator has, as such, recovered final judgment for land, is *prima facie* evidence of assets. *Blodget v. Collard's adm'r.*, 7 Vermont, 9.
2. (*Same.*) Showing the intestate had given a quitclaim deed, which might cover the same land, does not rebut this evidence of assets, or account for the same. *Ib.*

ASSIGNMENT.

1. (*Delivery of deed.*) It is not essential to the immediate operation of a deed that it be put directly into the hands of the assignee, but it is indispensable to its effect, that the assignor should part with it, by putting it into a course of transmission or delivery. *M'Kenney v. Rhoads*, 5 Watts, 343.
2. The deposit of a deed in the post office directed to the assignee, is equally available for that purpose as a delivery of it to a messenger. *Ib.*
3. (*Set-off.*) A, the holder of a promissory note, a short time before the failure of the drawer, and in anticipation of that event, sold it to B, who was indebted to the drawer. On the failure of the drawer, his assignees brought an action against B, who set off the promissory note and obtained a verdict and judgment: Held, that A had a right to dispose of the note to B, and that the assignees had no cause of action against him. *Heppard v. Beylard*, 1 Wharton, 223.

ASSOCIATION.

1. (*Where property is in common.*) An association by which each surrendered his property into one common stock for the mutual benefit of all, during their joint lives, with the right of survivorship, reserving to each the privilege to secede at any time during his life, is not prohibited by law. And that right of secession is not transmissible to the personal representative of a party to such agreement, so as to enable him to recover the property of his intestate, so put into the common stock. *Schreiber v. Rapp*, 5 Watts, 351.
2. (*Contract with religious society.*) A member of a religious society cannot avoid a contract with it on the basis of its peculiar faith, by setting up the supposed extravagance of its doctrines as proof that he was entrapped. *Ib.*

ASSUMPSIT.

1. (*Implied promise.*) A request by a father to a physician to attend his son, then of full age, and sick at the father's house, raises no implied promise on the part of the father to pay for the services rendered. *Boyd v. Sappington*, 4 Watts, 247.
2. (*Decree of court of chancery.*) Assumpsit will not lie upon a decree of a court of chancery in another state. *McKim v. Odom*, 3 Fairfield, 94.
3. (*Principal and agent.*) Where A and others, as directors of a proprietary, acting within the scope of their authority, contracted with one, under their own seals, to pay him a stipulated price for certain materials to be furnished by him, it was holden that when furnished, he might maintain assumpsit against the proprietary for the price. *Cram v. The Bangor House*, 3 Fairfield, 354.
4. (*Fraudulent representation.*) Where a party, by a fraudulent representation of being the owner of land, induces another to bestow labor upon it in the expectation of enjoying the property as a joint owner, the latter party, on discovery of the fraud, may abandon the contract under which the labor was performed, and recover on the common count of *indebitatus assumpsit*, the value of the work done. *Rickard v. Stanton*, 16 Wendell, 25.

5. (*Quantum valebat.*) Where a contract for the sale and delivery of personal property specifies the quantity, price, and time of performance, the vendor is not entitled to recover under a *quantum valebat* for a portion less than the whole quantity agreed to be delivered, notwithstanding that the vendee has consented to a variation of the contract as to price, and time of performance. *Mead v. Degolyer*, 16 Wendell, 632.

ASSUMPTION.

- (*Accepted order creating no indebtedness.*) H. requested B., in writing, to pay a debt for her son, adding, "You may make yourself paid out of any unsold property that is in your hands, in my favor." B. paid the debt accordingly : Held, that he had no recourse beyond such funds then in his hands, and that no such indebtedness was created on the part of H. as would defeat a subsequent voluntary conveyance by H. to her children. *Hart v. Hart*, 5 Watts, 106.

ATTACHMENT.

1. (*Interest of joint tenant.*) The interest of one joint tenant in the joint property, may be taken by attachment, for his individual debt ; and the property attached may be removed, notwithstanding the rights of the other joint tenant, under an agreement between themselves, may thereby be impaired. *Remington et al. v. Cady et al.*, 10 Conn. R. 44.
2. (*Several writs served on same day.*) Where sundry writs of attachment, in favor of different creditors, were served, by different officers, on the same personal property, in the course of the same day, and the returns on all the writs, except one, stated the time of day when the service was made, and that one stated only a service on that day ; it was held, that it was neither matter of legal presumption nor construction, that the latter writ was served at the same time with any of the other writs. *Brainerd et al. v. Bushnell*, 11 Conn. R. 16.
3. (*Same.*) In such case, parol evidence is admissible to show at what time of the day specified in the return, the service was in fact made ; such evidence being entirely consistent with the return ; for though a day, in legal consideration, is *punctum temporis*, without fractions, yet where justice requires it, the

exact time when an act was performed, may be shown, by parol evidence. *Ib.*

ATTACHMENT, (FOREIGN.)

(*Income of wife.*) Where one bequeathed the interest of a certain sum to his wife during her life; and his widow afterwards married again; it was held that the interest so accruing was not liable to a foreign attachment, at the suit of a creditor of the second husband. *Robinson v. Woelpper*, 1 Wharton, 179.

ATTORNEY AT LAW.

(*Negligence or misconduct.*) An attorney at law who collects money and neglects or refuses to pay it over to his client until sued for it, is entitled to no compensation for his professional services. *Bredin v. Kingland*, 4 Watts, 420.

AWARDS.

1. (*Title to real estate.*) An award of arbitrators, though it cannot, *proprio vigore*, transfer the title of real estate, may decide in whom the title is; and it will conclude the party against whom it is made, and those claiming under him, from contesting such title again. *Shelton v. Alcox et al.*, 11 Conn. 240.
2. (*Same.*) And for this purpose it is not necessary that the submission or award should be by deed. *Ib.*
3. (*Chancery.*) Chancery has jurisdiction to inquire into awards, though made on a reference in a court of law, on the ground of fraud on the referees discovered after judgment on the award. *Waples's adm'r. v. Waples et al.*, 1 Harrington, 392.

BAILMENT.

(*Liability of depositary.*) One who is the mere depositary or mandatory of the money of another, and does not use it as his own, is answerable for the loss of it only in case of gross neglect on his part. And where the bailment is such as to render the bailee accountable, and he lends the money to one who fails, whereby it is lost, the bailee's liability accrues as soon as the failure is known, and is barred in five years, by the statute of limitations, unless a new promise to pay, or acknowledgment of the obligation, within five years, is shown, and coupled with a good consideration. *Sodowsky's Executor v. McFarland and Wife*, 3 Dana, 205.

BANK.

1. (*Collection of notes by.*) Where a promissory note is deposited in bank for collection by the holder, the agency of the bank for the holder, under the custom, extends only to receiving the amount, or in default of payment by the drawer, to placing the note in the hands of a notary for demand and protest against the maker and indorser. *Bellemire v. The Bank of the United States*, 1 Miles, 173.
2. (*Same.*) Where the bank does this, and the notary omits to give notice to the indorser of non-payment by the drawer, whereby the indorser is discharged, the notary is liable to the holder in case of the inability of the drawer to pay, but not the bank. *Ib.*
3. (*Same.*) But if the bank, contrary to the custom, on receiving a note for collection, does not employ a notary to protest for non-payment, but employs any other person as an agent to give notice of such non-payment, which person omits to give such notice, whereby the indorser is discharged, the bank is liable to the holder for the amount of the note. *Ib.*
4. (*Same.*) A note was deposited in bank for collection, and at maturity, was carried out by the bank, in mistake, in the bank-book of the depositor to his credit, as paid. The bank, subsequently, on discovering the mistake, erased the credit from the bank-book of the depositor, who gave notice to the bank that he held it responsible for the amount, and afterwards drew a check for the amount (having no other deposit in bank) which was refused payment. The bank proceeded to sue the drawer of the note in its own name, and afterwards sued his bail, both of which suits proved fruitless. Held, that the bank, by thus instituting suit against the drawer after the termination of their agency for the plaintiff by his notice that he held it responsible, assumed the property in the note, and became liable to the plaintiff for the whole amount. *Wetherill v. The Bank of Pennsylvania*, 1 Miles, 399.
5. (*Same.*) It seems, that even if the bank had not thus instituted suit, it would have been liable to the plaintiff for the amount, by reason of the lapse of time between the date of the maturity

of the note, and notice to the plaintiff of the mistake in extending the note to his credit as paid, and that it would not have been necessary to have enabled the plaintiff to recover, that he should have proved that he had sustained actual damage or loss. *Ib.*

BASTARDY.

1. (*Character of mother.*) The moral character of a woman, who appears in the county court, and testifies to the paternity of her illegitimate child, may be proved, in order to discredit or weaken her evidence. *Sword v. Nester*, 3 Dana, 453.
2. (*Single and not married women.*) The bastardy act applies to single women only; there can be no valid judgment of paternity, for the child of a married woman, as an illegitimate—though she may have abandoned her husband. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. (*Money had and received.*) Where a party gives an acceptance for the accommodation of another, who passes it to his creditor to apply in payment of a note, and the creditor procures the acceptance to be discounted, and transmits its avails to the acceptor, with instructions to apply the same to the payment of the note, who, instead of doing so, applies the avails to a general account against the drawer, an action lies in favor of the creditor against the acceptor, for so much money had and received, notwithstanding that the acceptance was mere accommodation paper, and that the acceptor at maturity was obliged to, and actually did pay the acceptance. *Patty v. Milne*, 16 Wendell, 557.
2. (*Set-off.*) In an action by a *bonâ fide* holder of a note, obtained before maturity by transfer, the maker cannot set-off a demand he had against the payee at the time of the transfer, although the note was accepted by the holder in payment of a precedent debt, unless the note was originally made for the accommodation of the payee, or was satisfied whilst in his hands, and fraudulently put by him into circulation. Even then, the set-off is not allowable if the holder can prove that he received it in the usual course of trade, paid value, parted with property, or gave credit on the faith of the paper at the time of the transfer. *Smith v. Van Loan*, 16 Wendell, 659.

3. (*Incapacity of one of the parties to a bill.*) The incapacity to contract of one party to a bill of exchange, does not diminish the responsibility of other competent parties to each other. Thus where a draft is made by a contractor with the United States to carry the mail, on the postmaster-general, which is accepted, but protested for non-payment, the drawer is liable to the holder. *Knox v. Reeside*, 1 Miles, 294.
4. (*Conditional acceptance.*) A conditional or restricted acceptance of a bill by the drawee, does not destroy the liability of the drawer to the holder, if it be drawn as payable absolutely, and in money. *Ib.*
5. (*Particular fund.*) The direction of the drawer to the drawee to charge the bill to a particular account between them, or to a particular fund, does not vitiate the bill as regards the liability of the drawer to the holder.

Thus, where upon protest for non-payment of a draft made by a mail contractor on the postmaster-general, payable on the 1st day of January 1836, in the body of which is "and charge the same to my account for transporting the United States mail," and which is accepted, "provided the drawer should perform his contract," a suit is brought by the holder against the drawer, the plaintiff is entitled to recover. *Ib.*
6. (*Giving of time.*) The holder of a promissory note, on the day the same falls due, accepts from the maker a check of a third person on a bank for the amount, payable in six days, to be in "full satisfaction for the note in case the check is duly honored at its maturity." Held, that the acceptance of such check amounts to a suspension of the remedy of the holder against the maker on the note, and is therefore a giving of time to the maker, so as to discharge the indorser. *Okie v. Spencer*, 1 Miles, 299.
7. (*Notice of protest.*) Notice of the protest of a bill may be transmitted through the several indorsers, to the drawer, and though the route may be circuitous, and cause delay, notice so transmitted, with due diligence throughout, will be sufficient to fix the liability of the drawer, and all the indorsers to whom notice is so sent. *Triplett v. Hunt*, 3 Dana, 128.

8. (*Note given for account.*) A note not negotiable, given for a subsisting account, is no bar to an action on the account. *Trustees, &c. v. Kendrick*, 3 Fairfield, 381.
9. (*Parol evidence.*) The maker of a note may prove by parol, that the payee, subsequent to the making of the note, agreed that payment might be made to a third person. *Low v. Treadwell*, 3 Fairfield, 441.
10. (*Bill drawn upon one's-self.*) A bill of exchange, drawn by one upon himself, is to be regarded as an accepted bill. *Cunningham v. Wardwell*, 3 Fairfield, 466.
11. (*Lunacy.*) Lunacy may be set up against a note at least as between the original parties or against the first indorsee. *Allen v. Babcock*, 1 Harrington, 348.

BOND.

1. (*In blank.*) A signature and seal attached to a blank piece of paper, for the purpose of having a bond thereafter written upon it, will not bind the party as an obligor in such bond : but if a party so signing and sealing, after the bond is filled up, adopts it as his bond, it is sufficient. *Byers v. McLanahan, Jr.* 6 Gill and Johnson, 250.
2. (*Same.*) Such adoption is a question of fact, to be collected from circumstances ; and a subsequent acknowledgment of the signature as his hand writing, to a party making the inquiry, without any intimation that he did not consider himself bound by the bond, would be sufficient proof of such adoption. *Ib.*
3. (*Delivery.*) Delivery is essential to the legal validity of a deed ; but such delivery may be either actual or verbal. It is sufficient that there be an intention, or assent of the mind to treat it as a deed, to clothe it with the attributes of a legal instrument. *Ib.*
4. (*To collector of revenue.*) The second section of the act of congress of the 19th of April, 1816, which makes it the duty of the collector of the revenue to take a bond from the proprietors of stills, with two or more sureties, is directory ; and a bond taken with one surety only, is not therefore void. *Sharp v. The United States*, 4 Watts, 21.

But a bond taken under that act, signed by one surety, which

contained in the body of it the names of two, is not recoverable against the one who signed it, unless it be proved that he who signed it dispensed with the execution of it by the other. *Ib.*

BONDS, REFUNDING.

1. (*Executed in France.*) Bonds executed here, in virtue of a power of attorney executed in France before a notary, according to the law of that country, but not under the seal of the complainants, were held not to be such as were required by the law of Pennsylvania. *Harman v. Harman*, 1 Baldwin, 131.
2. (*Seal.*) The seal of a party is necessary to give a paper the effect of a bond in preventing the bar of the act of limitation, and giving it priority as a specialty in paying the debts of a decedent. *Ib.*

BOND TO CONVEY.

1. (*Performance of.*) Where a party binds himself to execute a good and valid deed of land, with the usual covenants, he is obliged to give a deed which conveys a good and sufficient title. *Stow v. Stevens*, 7 Vermont, 27.
2. (*Assignment of breach.*) Where an obligor binds himself, upon the payment of money and the execution of notes, at a certain time, to convey land by a good and valid deed, and previously conveys the same to another; the obligee must, in assigning a breach, aver his readiness to pay the money and execute the notes, although he need not tender a performance. *Ib.*
3. (*Rescinding of contract.*) In such case, where money was paid at the time the bond was executed under seal, the obligee is at liberty to regard the act of the obligor, in conveying the land to a stranger, as a rescinding of the contract, and may resort to the common counts for his remedy. *Ib.*

BOOK DEBT.

- (*Special agreement.*) A claim for the breach of a special agreement, cannot be recovered in an action of book debt. *Greene v. Pratt et al.*, 11 Conn. 205.

BOOK ENTRY.

1. (*Account against plaintiff by third person.*) An account against the plaintiff by a third person, merely proved by a deposition, "to have been faithfully made out from the original

entries in the books of the deponent," is not competent evidence for the plaintiff. Nor would the books themselves be admissible with no better proof of authentication. *Bidden v. Petriken*, 5 Watts, 286.

2. (*Original entries.*) It is not a valid objection to the admission in evidence of original entries, that the book in which such entries are made, contains other charges which are admitted not to be original. *Ives v. Niles*, 5 Watts, 323.
3. (*Memoranda upon slate.*) Memoranda made upon a slate, and transcribed into a book five or six days afterwards, are not such original entries as can be submitted to a jury as evidence. Nor will any prevailing custom make them evidence. *Forsythe v. Norcross*, 5 Watts, 432.

BOTTOMRY BOND.

1. (*Purchaser without notice.*) A valid bottomry bond will be upheld, where there are no laches on the part of the lender, even against a *bond fide* purchaser, without notice. *The Brig Draco*, 2 Sumner, 157.
2. (*Where vessel sold or transferred.*) If, after the risk on a bottomry bond has commenced, a sale or transfer of the vessel takes place, or the voyage is in any manner broken up by the borrower, the maritime risk terminates, as in the case of a policy of insurance, and the bond becomes presently payable. *Ib.*
3. (*Effect of sale or transfer.*) Where it was expressly stipulated in a bottomry bond—"that the said brig shall be delivered to no other use or purpose whatsoever, until payment of this bond is first made;" held, *à fortiori*, that a sale of the brig, after the commencement of the maritime risk, terminated the risks under the bond, and entitled the lender to an immediate right of action. *Ib.*

BOUNDARIES.

- (*Inconsistent.*) Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing intention manifested on the face of the deed. *Gates v. Lewis*, 7 Vermont, 514.

BY-LAW.

- (*Of bank.*) A by-law of a bank, giving it a lien on stock for the

debts of the holder, is valid. *M^d Dowell v. Bank of Wilmington & Brandywine*, 1 Harrington, 27.

CASE.

1. (*Extinguishment of way*.) The encroachment, by one party, upon a way held in common, by building part of the wall of a house upon a portion of it and enclosing another portion within fence, work an extinguishment by operation of law; especially where the other party sells his interest after such acts done, and the purchaser on his part acquiesces in and confirms what has been done. *Corning v. Gould*, 16 Wendell, 531.
2. (*Relinquishment of easement*.) Where a party relinquishes the enjoyment of an easement or servitude, it lays with him to show an intention to resume the use of it within a reasonable time; and where there are no circumstances intimating the suspension to be temporary only, a *bonâ fide* purchaser will be protected in the enjoyment of the property as it appeared at the time of his purchase. *Ib*.
3. (*Evidence of good character*.) Evidence of the good character of the defendant, for honesty and fairness in business transactions, is not admissible, in defence, in an action on the case, for a fraudulent representation. *The case of Ruan v. Perry*, 3 Caines, 120, overruled; *Gough v. St. Johns*, 16 Wendell, 646.

CHARACTER.

(*Of female witness*.) The character for veracity of a female witness may not be impeached by evidence of her general character for chastity. *Gilchrist v. M^r Kee*, 4 Watts, 380.

CHARTER-PARTY.

(*Effect of, as to ownership*.) The general owner of a ship will be deemed owner for the voyage, notwithstanding a charter-party, if he retains the possession and control of the navigation of the ship during the voyage, and if the master is his agent, acting under his instructions. So also, if the intention of the parties, with regard to this point, seems doubtful on the face of the charter-party. *Certain Logs of Mahogany*, 2 Sumner, 589.

CHATTELS.

(*Property in*.) A contract by a merchant to deliver hides to a

tanner, to be charged at cost and five per cent. commission, and interest after six months, and when tanned to be returned to the merchant to be sold by him, and out of the proceeds of the sale the first cost and five per cent. to be deducted, and the balance to be paid to the manufacturer, is such a sale as will subject the hides to levy and sale as the property of the manufacturer. *Jenkins v. Eichelberger*, 4 Watts, 121.

COMMENCEMENT OF A SUIT.

1. (*What.*) The time of commencement of a suit to avoid the statute of limitations, is the day when the writ issued, but such writ must be served and returned. *Day v. Lamb*, 7 Vermont, 426.
2. (*Same.*) The date of the writ is considered *prima facie* evidence of the day when the same is issued. *Ib.*

COMMON CARRIER.

1. (*Defence in an action by, to recover price for carrying goods.*) In an action by a common carrier against the consignee, to recover the price of carrying, the defendant may set up as a defence, negligence or want of skill in the carrier, by which the goods were deteriorated in value. *Leech v. Baldwin*, 5 Watts, 446.
2. (*Accountability of, in spite of notice.*) Where one established a line of stages, and posted notices "that he would not be accountable for any baggage, unless the fare was paid and the same was entered on the way bill:" Held, nevertheless, that he was liable for the loss of a trunk through negligence, though the fare was not paid; a knowledge of the notice not having been brought home to the owner of the trunk, or his servant who carried it to the stage office. *Bean v. Green et al.*, 3 Fairfield, 422.

COMMISSION MERCHANTS.

1. (*Duties &c. of.*) The usages of commerce regulate the duties and privileges of commission merchants, and generally form their contracts in business; which usages are matters of fact, and susceptible of proof. *Rapp v. Grayson*, 2 Blackford, 130.
2. (*Same.*) It is as much the duty of a commission merchant to obey instructions, with regard to the shipping of goods deposited with him to be shipped, as it is to keep them safely while in his

care. This duty devolves on all who are acting for him as clerks or agents; and, while they are recognised as acting for him, their authority must be presumed to be co-extensive with his, as to the business he is thus transacting by them. *Id.*

COMPROMISE.

(*Consideration of.*) A collision of claims constitutes a sufficient consideration for an agreement of compromise:—a party, having agreed, by way of compromise, to abide the legislative action upon his rights, cannot avail himself of the unconstitutionality of an act that destroys his claim, to avoid the agreement. *Walker v. Tipton*, 3 Dana, 5.

CONFUSION OF GOODS.

It is a rule, both at law and in equity, that if a person having charge of the property of another, so confounds it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; and, if it be a case of damages, the damages given against him will be to the utmost value of the property. *Brackenridge v. Holland et al.*, 2 Blackford, 377.

CONSIDERATION.

1. (*Expectation of marriage.*) An expectation on the part of the promisee that the promiser would marry her, is not a sufficient consideration for the promise. *Raymond v. Sellick et al.*, 10 Conn. 480.
2. (*Promise by legatee to testator.*) A promise by a legatee to the testator, that he would pay a certain sum of money to another person, in consequence of which the testator omitted to bequeath the same sum to that person, is a good consideration for notes afterwards executed by the legatee to him. *Gaullaher v. Gaullaher*, 5 Watts, 200.

CONSTITUTIONAL LAW.

1. (*Trial by jury.*) The twenty-second article, securing the right of trial by jury, applies only to criminal cases, and civil cases where a right is to be tried at law; not to mere collateral questions of damages, where no suit is pending, and the right of both parties is admitted. *Bonaparte v. The Camden and Amboy Railroad Company*, 1 Baldwin, 222.

2. (*Confirmation of conveyance.*) The legislature has the power to confirm conveyances defectively executed; and acts for that purpose must be carried into effect. The intention of the legislature to confirm a deed must be collected from the nature of the application made to them, and the terms they have used in granting the confirmation. *Dulany and Wife and Dangerfield v. Tilghman*, 6 Gill and Johnson, 461.
3. (*Limitation of estates.*) It is competent for the legislature upon the request of parties, owners of real property, to limit and vest their estates as they desire, or as they could do by deed. *Ib.*

CONSTRUCTION.

(*Meaning of "personal property of every kind."*) An assignment conveyed to the plaintiff "all the goods, wares, merchandises, and personal property of every kind, belonging to the late firm," &c. Held, that the words "personal property of every kind," in the foregoing connexion, signify visible, tangible property, *ejusdem generis*, as goods, &c., and that an interest under a contract would not pass thereby. *Kendall v. Almy*, 2 Sumner, 278.

CONSTRUCTION OF LAWS.

(*Imposing penalty.*) The words of a law imposing a forfeiture or penalty shall not be construed to embrace a case not within the parts of the law which prohibit the act done, or direct the performance of an act, by the omission of which the penalty or forfeiture is incurred. *United States v. Twenty-four Coils of Cordage*, 1 Baldwin, 506.

CONSUL.

(*Effect of certificate.*) A consul's certificate of any fact is not evidence between third persons, unless expressly or impliedly made so by statute. *Levy v. Burley*, 2 Sumner, 355.

CONTRACT.

1. (*Enforcing of.*) Equity will not enforce a contract which is not definite and precise in its terms, or reform a written contract by a previous one by parol on the same subject; any variance will be presumed to have arisen from a change of intention, in the absence of fraud, mistake or accident. *Tilghman and Wife v. Tilghman's executors*, 1 Baldwin, 486.

2. (*Same.*) The writing must recite or refer to something by which to reform it, or there must be some matter of higher authority than the writing to authorize it. *Ib.*
3. (*Same.*) If a paper deliberately agreed upon to effect an object, fails to do so by the death of the party who was to do the necessary act, equity will not give a remedy by setting up a previous agreement. *Ib.*
4. (*Technical words.*) Technical words in a written contract must have a technical interpretation: hence, a relinquishment of all right of dower to, in, or out of, an estate, which the releasor had in law or in equity, or in any way might or could possibly have, will not exclude a widow from a share of the personal estate under the statute of distributions. *Ellmaker v. Ellmaker*, 4 Watts, 89.
5. (*Performance.*) A contract for the delivery of specific articles of property to another, at a certain time and place, in discharge of a previous debt, is performed and the debt satisfied by a tender and delivery of the property at the time and place, although the payee did not attend to receive the property. And no action on the contract can afterwards be maintained against the debtor. *Case v. Green*, 5 Watts, 262.
6. (*Damages.*) A contract to "have a boat ready for the spring trade on the 1st of March ensuing, and, on failure, to pay ten dollars damages for every day after that time, until the boat is ready," is a covenant that it shall be ready on the 1st of March ensuing, for the spring trade; and although it could not have been then used for that purpose, the stipulated damages are recoverable. *Young v. White*, 5 Watts, 460.
7. (*Mutual.*) Where the contract was, on the part of one to convey, and on the other to pay at a future time, it was held that the former was bound to convey on demand, and could not rightfully withhold the deed until the term of credit had elapsed. *Eveleth v. Scribner*, 3 Fairfield, 24.
8. (*Construction of.*) Where one was arrested at the suit of his creditor, and A agreed in writing, in consideration that the creditor would discharge his debtor from the arrest, to pay him within 60 days, "all such sums of money as may now be due

and owing to him" from said debtor, "whether on note or account;" the agreement was construed to embrace those debts only which were then actually payable. *Hawes et al. v. Smith*, 3 Fairfield, 429.

9. (*Sunday*.) Upon a contract to deliver merchandise at a future day, if the day mentioned be in fact on Sunday, in analogy to the usage in other commercial cases, the day of delivery, according to the legal effect of the contract, is Saturday. *Kilgour v. Miles & Goldsmith*, 6 Gill and Johnson, 268.

CONVEYANCE.

1. (*Escrow*.) A deed can never be delivered as an escrow to the grantee himself. *Flagg v. Mann*, 2 Sumner, 487.
2. (*In fraud of creditors*.) A voluntary conveyance to a child, by a father who was indebted at the time, is not, *ipso facto*, fraudulent and void under the statute of 13 Eliz.; if the grantor had other property at the time, or was otherwise of sufficient ability to pay all his debts, it will be referred to a jury to determine whether there was any design to defraud creditors; if there was not, the conveyance is valid. *Chambers v. Spencer*, 5 Watts, 494.
3. (*Construction of terms of*.) A father conveyed to his son, one hundred and thirty-two acres of land in fee, and an interest in his dwelling-house and barn standing on other land, in the following terms: "and also that the said J. shall have the privilege of the eastern part of the dwelling-house, one lower room, bed-room, and cellar and chamber, and one fourth part of the barn, so long as they shall stand, to his use." Held, that it conveyed merely a personal privilege to the son, which was not assignable by him to a stranger. *Lord v. Lord*, 3 Fairfield, 88.
4. (*Boundaries*.) In the grant of a lot of land, it was bounded upon a certain pond—the water, at the time, being raised by artificial means above its natural level. Subsequently, on the obstructions being removed, and the consequent recession of the waters, two and a half acres, between the lines of the lot, became disencumbered and capable of tillage. Held, that the lot was not limited to the margin of the pond, as it was at the

time of the grant, but that it embraced the two and a half acres. *Hathorne v. Stinson et al.*, 3 Fairfield, 183.

CORPORATIONS.

1. (*Public use.*) A road, canal, &c., is for public use, when the public have a right of passage on paying a stipulated, reasonable, and uniform toll, whether it is constructed by the state or corporation. But if the toll amounts to a prohibition, it is a monopoly, and the road is not public. *Bonaparte v. The Camden and Amboy Railroad Company*, 1 Baldwin, 223.
2. (*Same.*) The declaration in the charter, that the Camden and Amboy Railroad is a public one, does not make it so, if the effect of the charter is to give the exclusive use to the corporation. *Ib.*
3. (*Service against.*) A foreign corporation cannot be summoned by a service on its head, or chief officer, who, at the time of service, may be within the territorial jurisdiction of this court. Such service is bad, as well under the act of March 22d, 1817, as at common law, and will be set aside on motion. *Nash v. The Rector, &c.*, 1 Miles, 78.
4. (*Power of majority of directors.*) Where the directors of a corporation have power to bind it by their contracts, that power may be exercised by a majority. *Cram v. The Bangor House*, 3 Fairfield, 354.
5. (*Stockholders in.*) An act of assembly incorporating certain persons by name, and all others thereafter becoming members, the object of which incorporation was declared to be to receive from time to time, deposits of money, and to pay the depositors such interest, as might from time to time be agreed upon by the directors, enacted, that for the security of the depositors, a certain capital should be raised, to be divided into shares, which should be transferable, &c. The act then proceeded to provide for annual meetings of the members, and for the election of directors from among the members; gave to the directors power to provide for the admission of members, and made it their duty to appoint from among the members, five persons as a committee of examination, and also to make a dividend of profits, and to pay the same over to the stockholders, or their

legal representatives: Held, that stockholders were not, as such, members of the corporation; consequently that the assignee of a stockholder did not by the assignment become a member; that persons originally members, continued to be such, although they never possessed stock, or had parted with it. *Philadelphia Savings Institution Case*, 1 Wharton, 461.

COSTS.

(*Attorney's fees as witness.*) Members of the bar are not entitled to witness' fees for attendance in a court in which they actually practise. *M'Williams v. Hopkins*, 1 Wharton, 276.

COURT.

1. (*Charge to jury.*) The court cannot give an unqualified charge to the jury, that the evidence is insufficient to support the action, unless in cases where it would be bound to set aside the verdict if for the plaintiff. *The Governor v. Shelby*, 2 Blackford, 26.
2. (*Same.*) The refusal of the court to give instructions to the jury, which are good law but not applicable to the case, cannot be assigned for error. *Rapp v. Grayson*, 2 Blackford, 130.

COVENANT.

1. (*Measure of damages.*) In an action founded on a breach of the covenant of warranty in a deed of conveyance, the true measure of damages, where there has been an eviction by judgment of law, is, the value of the land at the time of the eviction and expenses incurred in defending the suit, including fees paid counsel. *Swett v. Patrick*, 3 Fairfield, 9.
2. (*To sell and convey land.*) Where one covenanted to "sell and convey" a lot of land for an agreed price, to be paid at a time subsequent to the giving of the deed, it was held that a tender of a deed of warranty, while the land was under the incumbrance of a mortgage, was not a fulfilment of the covenant. *Sibley v. Spring*, 3 Fairfield, 460.
3. (*Condition precedent.*) A party covenants to pay so much money, by such a day, "for and in consideration of the services of a negro man"—the services to commence at a future day, and end on the day fixed for the payment: Held, that the performance of the services is a condition precedent, which

must be averred in an action for the money. *Brown v. Lowens*, 3 Dana, 473.

4. (*Real*.) Covenants to repair and rebuild on the land, are covenants running with the land; and so is a covenant to effect insurance and apply the proceeds in case of a loss by fire, to the reparation of the insured property. *Thomas's adm'rs. v. Vonkapff's executors*, 6 Gill and Johnson, 372.

CRIMINAL LAW.

1. (*Forgery of note lost or destroyed*.) In an indictment for forging a promissory note, if the note be lost or destroyed, it is sufficient to set forth the substance thereof, alleging the loss or destruction of the instrument. *The People v. Badgley*, 16 Wendell, 53.
2. (*Indictment*.) The indictment will be sustained, although it does not allege that the note purported to be signed by the person whose name was forged; if it set forth the purport of the note, giving the name of the maker as part of the description, it is sufficient. *Ib.*
3. (*Variance in description*.) Although in the indictment the note is described as made on the (blank) day of May, and the proof is that the forged note was dated on a particular day, a conviction will be sustained notwithstanding the variance, when a satisfactory reason for the omission of a more particular description is given in the indictment. *Ib.*

CUSTOMS.

1. (*How far evidence of, admissible*.) Held, that evidence is not admissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the danger of the seas only excepted, by establishing a custom, that the owners of packet-vessels between New York and Boston, should be liable only for damage to goods, occasioned by their own neglect. *The Schooner Reeside*, 2 Sumner, 567.
2. (*Wheat crop in Delaware*.) The way going tenant is entitled to the wheat crop by the general custom of this state, not so of the oat crop. *Templeman v. Biddle*, 1 Harrington, 522.

DAMAGES.

1. (*Rule of, in case of officer's default.*) In an action against an officer for neglect of duty in returning a writ of attachment, by him served on the chattels of the debtor, the rule of damages is the injury actually sustained by the default of the officer, and not the value of the property attached. *Clark v. Smith*, 10 Conn. 1.
2. (*Evidence.*) In an action of assault and battery, by a person employed in a manufacturing establishment, against the proprietor, the defendant cannot, in mitigation of damages, give in evidence the improper conduct of the plaintiff in his business, before the time of the alleged assault. *Matthews v. Terry*, 10 Conn. 455.
3. (*Pawnee.*) A pawnee may use the pawn, provided it be not the worse for it; but he is answerable for damages occasioned by so using it. *Thompson v. Patrick*, 4 Watts, 414.
4. (*Vindictory.*) In an action of trespass for a wilful and malicious abuse of process and sale of the property of the plaintiff, he may recover vindictory damages, although the meditated oppression was not intended for the plaintiff but for another. *M^r Bride v. M^r Laughlin*, 5 Watts, 375.
5. (*Measure of.*) In an action of trespass against one for taking a quantity of logs belonging to the plaintiff, the latter was permitted to recover, under the general averment of damages, the profit he would have made by sawing the timber, and by its appreciation in price. *Bucknam v. Nash et al.*, 3 Fairfield, 474.
6. (*Estimation of in trespass.*) In trespass, *de bonis asportatis*, the verdict is made up upon two different incidents: 1. the fact of taking—which is actionable, though the plaintiff sustains no loss of property by it; and which may be attended with circumstances more or less aggravated, and for which—there being no *data* by which the actual injury can be computed—the jury must assess damages, actual or vindictive, according to their discretion—subject, only, to the power of the court to grant a new trial; and 2, the plaintiff's actual loss of property—by being totally deprived of it; by its being injured; by expenses in recovering it, &c. the value or amount of which is, so far,

the criterion of damages. Hence, the measure of damages, in such cases, is not always the value of the property taken, with smart money; and evidence (of any facts which could not be specially pleaded), is admissible in mitigation of damages—to show, that the property was restored; the proceeds applied to the plaintiff's use; that he bought it in at an under-value, &c. The true measure of damages, is the actual loss or injury sustained by the plaintiff, augmented by such smart money as the jury, in their unrestricted discretion, think proper to allow. *Board v. Head*, 3 Dana, 491.

7. (*Legal sale of property wrongfully taken.*) A constable having an execution against a defendant residing in an adjoining county, passes over into that county, and there seizes defendant's horse, which he takes to his own county, and sells, and credits the execution with the net proceeds: held, that the horse, though thus illegally taken and brought into the constable's county by him, when there, was subject to the execution and sale; and that the constable being sued for the trespass, may show, in mitigation of damages, that the value of the horse or some part of it, went to pay the plaintiff's debt, or to his use. *Board v. Head*, 3 Dana, 494.

DEBTOR AND CREDITOR.

- (*Payment of particular debt.*) When a debtor pays, he may require that the money be applied to a particular debt; and if a debtor perform labor for a creditor, upon an agreement that it shall be applied to the payment of a particular debt, the creditor cannot change this appropriation, without the consent of the debtor, so as to avail himself of a facility to secure the debt thus extinguished, which he could not do as to another debt. *Martin v. Draher*, 5 Watts, 545.

DECREE.

1. (*Debt on.*) The general doctrine is, that an action of debt cannot be sustained on a decree in chancery. *Elliott et al. v. Ray*, 2 Blackford, 31.
2. (*Same.*) An action of debt will not lie on the decree of a court of chancery in another state, unless the decree have, by the statute of that state, the force and effect of a judgment at law. *Ib.*

3. (*Same.*) If the decree have such effect by statute, that fact should be averred and proved; the statutes of other states not being noticed here without proof. *Ib.*

DEDIMUS POTESTATEM.

(*When issuable.*) The court, upon the application of one party, and without the consent of the other, will issue a *dedimus potestatem* to take testimony in a foreign jurisdiction. *Farnsworth v. Pierce*, 7 Vermont, 83.

DEED.

1. (*Inconsistencies in.*) Where the particulars, in the description of land in a deed, are inconsistent and incongruous, the court may reject a part and give effect to the deed. In doing this, they will be guided by the intent of the parties, as gathered from the deed. *Hull v. Fuller*, 7 Vermont, 100.
2. (*Acknowledgment.*) The acknowledgment of a deed must appear upon the deed; and no defect in the certificate of the magistrate can be helped, by parol evidence. *Hayden et al. v. Wescott*, 11 Conn. 129.
3. (*Reservation.*) A deed of land to the grantee and his heirs and assigns for ever, reserving the use and improvement of the premises to the grantor, during his life, is a valid conveyance. *Fish v. Sawyer*, 11 Conn. 545.
4. (*Delivery as an escrow.*) An agreement to deliver a deed as an escrow to the person in whose favor it is made, will not make the delivery conditional; but if delivered under it, it is an absolute delivery, and a consummation of the execution of the deed. *Simonton's Estate*, 4 Watts, 180.
5. (*Construction of exceptions in.*) B. by deed conveyed to F. a tract of land in fee simple, "excepting and reserving for himself, his heirs, executors, administrators, and assigns all mineral or magnesia of any kind, and to convey the same away through the premises intended to be sold, so as to do as little damage to the owner as possible, with all bricks and blocks of soapstone, as I said the said B. may want for my own use." Held, that this was such a reservation as entitled the grantor to chromate of iron, afterwards found. *Gibson v. Tyson*, 5 Watts, 34.

DEFENCE.

1. (*Negligence of plaintiff.*) If an obligee in a bond obtain a judgment against the principal, and suffer it to remain, without revival, until the lien on his lands be lost, and afterwards sue the surety on the same bond, the latter cannot avail himself of the negligence of the plaintiff, as a defence. *Mundorff v. Singer*, 5 Watts, 172.
2. (*Where notice of special matter required.*) If the plaintiff, in an action of debt, require of the defendant notice of the special matter upon which he relies for his defence, and it be not given to him, a deposition, establishing a special defence, cannot be read in evidence, although there be an agreement in writing by the attorney who had been retained by the plaintiff merely to attend the taking of the deposition, that it should be read. *M'Churg v. Trevor*, 5 Watts, 275.

DEMAND.

- (*By bank depositor.*) A bank depositor must make an actual demand for his deposit before suit brought. *Johnson v. The Farmers' Bank*, 1 Harrington, 117, 496.

DEPOSITION.

1. (*When containing improper matter.*) When a deposition contains matter improper to be given in evidence, it should not be delivered to the jury, but the party should be permitted to read only such parts as are admissible. *Wood v. Stewart*, 7 Vermont, 147.
2. (*Where partly illegal.*) It is not error to admit in evidence a deposition, a part of which is illegal, upon a general objection to the whole deposition. The objection should be confined to such illegal portion. *Atchison v. McCulloch*, 5 Watts, 13.

DESCENTS, DEVISES AND BEQUESTS.—(In Kentucky).

1. (*Widow.*) The widow inherits the husband's estate, when he leaves no other kindred. *Stat. Law*, 561. *Stover v. Boswell's Heir, &c.*, 3 Dana, 233.
2. (*Bastards.*) Bastards, by the common law, have no inheritable blood. But, by a statute of Kentucky (*Stat. Law*, 565), they are capable of inheriting and transmitting inheritances on the part of the mother. *Ib.*

3. (*Mother.*) The mother does not succeed to the real estate, which an infant, dying without issue, derived from his father, if there be any brothers or sisters of the infant, or of his father, or descendants of any such brothers or sisters. (*Stat. Law*, 562). But when the infant leaves no such relations, the mother takes the estate. *Ib.*

DESCENT.

- (*Of property to grandchildren.*) The grandchildren of an intestate take their share of his estate by substitution, not through, but paramount to, their parent. Hence, it is not subject to their father's debts, where he dies before such intestate. *Ilgenfritz's Appeal*, 5 Watts, 25.

DEVISE.

- (*Date of title under.*) The title of a devisee under a will, to whom an immediate estate is given, will date from the death of the testator, and not from the time of the probate of the will. *Spring v. Parkman*, 3 Fairfield, 127.

DONATIO CAUSA MORTIS.

1. (*Will subsequently made.*) A will having been made subsequent to an alleged *donatio causâ mortis*, regularly proved before the register, and not impeached on the trial, is conclusive evidence that the gift was not made during such a last sickness as the law requires to constitute a disposition of property *causâ mortis*. *Adams v. Nicholas*, 1 Miles, 90.
2. (*Same.*) If at the time of the gift the sickness of the donor were such as to induce him to believe that he was near his death, and he had not time to make a disposition by will, yet if, afterwards, a will in writing should be made by him, and duly proved after his death, and not impeached on the trial, it is conclusive evidence that the donor had escaped from the peril of death impending at the time of the donation, so that it cannot take effect as a *donatio causâ mortis*. *Ib.*

DOWER.

- (*Damages in.*) Damages for arrears of dower can be recovered against a purchaser only from the time of his title accrued. *Newbold v. Ridgway et al.*, 1 Harrington, 55.

EQUITY.

1. (*Fraud.*) If an owner stands by, and knowingly suffers an innocent person to be misled by his silence, and to purchase his property without giving him notice of his title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the future assertion of that title by the owner. *The Brig Sarah Ann*, 2 Sumner, 206.
2. (*New witnesses.*) The general rule of equity proceedings is, that after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken, unless where the judge himself, upon or after the hearing, entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. *Wood v. Mann*, 2 Sumner, 316.
3. (*Same.*) A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the merits of the case. *Ib.*
4. (*Competency of witness.*) When a witness has been cross-examined by a party, with a full knowledge of an objection to his competency, a court of equity will not allow the party to raise the objection at the hearing. *Flagg v. Mann*, 2 Sumner, 487.

EQUITY JURISDICTION IN THE U. S. COURTS.

1. (*Under the judiciary act.*) The sixteenth section of the judiciary act is a declaratory act settling the law as to cases of equity jurisdiction, in the nature of a proviso, limitation, or exception to its exercise. *Baker v. Biddle*, 1 Baldwin, 403.
2. (*Same.*) If the plaintiff has a plain, adequate and complete remedy at law, the case is not a suit in equity under the constitution or the judiciary act. *Ib.*
3. (*Same.*) There cannot be concurrent jurisdiction at law and in equity, where the right and remedy are the same, but equity may proceed in aid of the remedy at law by incidental or auxiliary relief, though not by final relief, if the remedy at law is complete. Its jurisdiction is special, limited and defined, not as in England where it depends on usage. *Ib.*

4. (*Same.*) Though the rules and principles established in the English chancery at the revolution, are adopted in the federal courts, the changes since introduced there are not followed here, especially on matters of jurisdiction, as to which the sixteenth section is imperative. *Ib.*

ERROR.

1. (*Legal interpretations.*) It is error in a judge to give a legal interpretation to the words of a witness. *Simpson v. M^{rs} Beth*, 4 Watts, 409.
2. (*In judge's instruction.*) When the defence is matter of fact, about which evidence has been given, it is error to instruct the jury, that "the defence set up fails, and the plaintiff is entitled to recover." *Fish v. Brown*, 5 Watts, 441.

ESTOPPEL.

1. (*How it may be availed of.*) The party in whose favor the title of land is determined, by an award of arbitrators, may avail himself of it, in a subsequent action, by way of estoppel. *Shelton v. Alcox, et al.*, 11 Conn., 240.
2. (*Same.*) Though it is generally true, that a party neglecting to plead an estoppel cannot take advantage of it; yet if the state of the case is such, that the party has no opportunity to plead it, he may show it in evidence, and it will have the same effect as though it were pleaded. *Ib.*

EVIDENCE.

1. (*Relevancy of question.*) A question cannot be put to a witness, the relevancy of which does not appear. *United States v. Gibert*, 2 Sumner, 19.
2. (*Log-book.*) The log-book is not proof *per se* of the facts therein stated, except in certain cases provided for by statute. *Ib.*
3. (*Of pardon.*) A pardon granted by a governor of a state, under its great seal, is evidence, *per se*, without any further proof. *United States v. Wilson and Porter*, 1 Baldwin, 91.
4. (*Certificate of the secretary of state.*) A certificate by the secretary of state, under seal of office, that a person has been recognised by the department of state as a foreign minister, is full evidence that he has been authorized and received as such by the president of the United States. *United States v. Benner*, 1 Baldwin, 238.

5. (*Slavery or freedom.*) On a question of slavery or freedom, the same rules of evidence prevail as in other cases concerning the right to property. *Johnson v. Tompkins, et al.*, 1 Baldwin, 577.
6. (*Opinion.*) The opinion of witnesses is not proper evidence, except in cases depending upon skill in some science or art, or when the opinion of the witness is derived from personal observation of the transaction. *Lester v. Pittsford*, 7 Vermont, 158.
7. (*Same.*) The opinion of a witness, not a professional man, formed upon a representation of the facts, as given in evidence, is never admissible. *Ib.*
8. (*Declarations of person not party.*) The declarations of a person not a party, who is living and a competent witness in the cause, though against his interest at the time they were made, are inadmissible. *Fitch v. Chapman*, 10 Conn. 8.
9. (*Declarations of one claiming as agent.*) The declarations of a person alleged to be an agent, are not evidence to prove the agency. *Ib.*
10. (*Declarations of former owner.*) The declarations of a former owner of the land in controversy, since deceased, made while he was owner, against his title, are inadmissible against others claiming under him. *Rogers v. Moore*, 10 Conn. 13.
11. (*Competency of witness.*) If the effect of the witness's testimony will be to augment a fund created for his benefit, he is incompetent; and it is not necessary that his interest in the fund should appear to be inevitable. *Bates et al. v. Coe*, 10 Conn. 280.
12. (*Blank indorsement.*) A blank indorsement of a negotiable note, by a third person, is only *prima facie* evidence of the contract which it imports; and it is competent, as between the parties to the indorsement, to prove by parol evidence, the agreement which was in fact made, at the time of the indorsement. *Perkins v. Catlin*, 11 Conn. 213.
13. (*Conversation.*) Where a declaration of a party is relied upon as evidence against himself, he is entitled to have the entire conversation given; but he cannot prove any other declaration made by him, to qualify, explain or detract from the

declaration proved, which is not a part of the same conversation; and the burden of showing it to be so, lies upon him. *Robinson et al. v. Ferry, et al.*, 11 Conn. 460.

14. (*Plaintiff's witness not impeachable by defendant after cross-examination.*) A defendant having cross-examined a plaintiff's witness on subjects irrelevant to the issue, will not be permitted to give evidence that the witness testified falsely on those subjects. *Griffith v. Eshelman*, 4 Watts, 51.

15. (*Instrument by one partner.*) If one partner sign and seal an instrument in the firm's name, and the other partner be present assenting to it, he is as much bound by the instrument as if he had signed and sealed it. Any evidence which tends to establish the fact of his having assented to it is admissible. *Fitchthorn v. Boyer*, 5 Watts, 159.

16. (*In slander.*) In slander, under the plea of not guilty, the defendant cannot give evidence of the plaintiff's admissions several years before, of his having been guilty of an offence similar to the one imputed to him by the defendant.

Nor is it competent for the defendant to prove, under such plea, that it was generally reported in the country for many years, that the plaintiff had been guilty of the offence charged against him by the defendant. *Long v. Brougher*, 5 Watts, 439.

17. (*Declarations of payee of note.*) In an action by an indorsee of a negotiable note, against the maker, the declarations of the payee after he had parted with the note, cannot be given in evidence. *Camp v. Walker*, 5 Watts, 482.

18. (*Deceased notary.*) The notarial book of a deceased notary is evidence of the facts it states in relation to protest, notice, &c. *Bank v. Cooper's adm.*, 1 Harrington, 10.

19. (*Protest of inland bill.*) The protest of an inland bill is not proved by the notarial seal, but the notary must be called: though it appear from the bill that it has been indorsed to a foreigner. *Ches. and Del. Canal Co.*, 1 Harrington, 234.

20. (*Indorsement of notary.*) The indorsement of a notary taken as evidence of the time of demand, though the protest bore a

different date, on a proof of his usage. *Bank v. Simmons*, 1 Harrington, 331.

21. (*Oath.*) The oath of one witness with corroborating circumstances, will outweigh an answer on oath. *M'Dowell v. Bank*, 1 Harrington, 369.
22. (*Same.*) *Quere?* Will not the oath of one witness, unsupported, establish a fact against the answer of a corporation. *Id.*
23. (*Opinions.*) The opinions of persons, accustomed to witness the agility and power of certain fish, in overcoming obstructions in the ascent of rivers, and who have acquired from observation, superior knowledge upon that subject, are admissible in evidence, to show that a stream, in its natural state, would or would not be ascendable by such fish. *Cottril v. Myrick*, 3 Fairfield, 222.
24. (*Same.*) In an action for breach of promise of marriage, the opinion of witnesses not possessing any professional or peculiar skill, that the plaintiff was once in a state of pregnancy, was held to be inadmissible. *Boies v. McAllister*, 3 Fairfield, 308.
25. (*Competency of witness.*) A purchased a quantity of goods of B, and gave his bill on C, at thirty days for the amount, which was protested for non-acceptance. In an action by B against C, to recover the price, A was held to be incompetent as a witness for B to prove that in making the purchase he acted as the agent of C. *Hewitt v. Lovering*, 3 Fairfield, 201.
26. (*Same.*) In assumpsit to recover the price of goods sold, the plaintiff, to show the sale and delivery, called a witness, who testified that he received the goods of the plaintiff on the defendant's account and in pursuance of verbal directions from him; but the court held the witness to be inadmissible, it appearing that the witness was not the agent of the defendant, and that the goods never came to the defendant's use or benefit. *Winslow v. Kelly*, 3 Fairfield, 513.
27. (*Deceased witness.*) Proof of what a deceased witness swore on a former trial, is admissible, where the same matter is in issue—between the same parties, and the oath was legal. *Rucker v. Hamilton*, 3 Dana, 38.
28. (*Same.*) One question involved in a pending trial, being the

same as one involved in the issue on a former trial, of a different action, between the same parties—proof is clearly admissible of what a deceased witness, whose testimony was confined to that single question, swore to, on the former trial. *Rucker v. Hamilton*, 3 Dana, 39. And—

29. (*Same.*) Even, when the testimony of the deceased witness was not confined to the matter in issue on the pending trial, but also relates to, and is inseparably connected with other facts, the whole may be admitted—provided the irrelevant portion is not such as may prejudice the adverse party. But the court should instruct the jury as to what part is material, and to be considered by them, and what they are to disregard. *Ib.*

30. (*Same.*) What a witness swears upon a regular trial before arbitrators, is legal evidence; and, when the witness is dead, what he thus swore, may be proved, upon any other trial, between the same parties, in relation to the same matter. *Kelly's ex'r v. Connell's adm'r*, 3 Dana, 532.

31. (*Same.*) Where proof is offered of evidence given by a witness who is since dead, the record (if any) of the case in which he was examined, should be produced, to show that the proceeding was judicial, and the oath binding; but where it was not matter of record, but *en pais* (as an arbitration) this rule cannot apply. *Ib.*

32. (*Same.*) Those things that are of record must be proved by the record; but matters *en pais*, not of record, are to be proved by evidence, positive or circumstantial. *Ib.*

33. (*Strengthening of.*) A witness who has given testimony of the occurrence of any event, at a particular period, the time of which is material, can strengthen his evidence by proving that it happened at the same time with, or before, or after, a particular epoch or transaction, the date of which can be proved with greater certainty. *Goodhand v. Benton, Jr.*, Gill and Johnson, 481.

34. (*Cross-examination.*) Evidence offered under a cross-examination, as well as on an examination in chief, must be pertinent to the issue, or have some connection with, or immediate influence on, material evidence adduced on the trial. *Ib.*

35. (*Same.*) A witness cannot be cross-examined upon irrelevant matter, impertinent to the issues in the cause, for the purpose of impeaching him; and when such immaterial evidence has been brought out, it will not authorize the introduction of contradictory proof for such purposes merely. *Ib.*
36. (*Consideration clause in a deed.*) The consideration clause in a deed, that is, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer, is open to explanation by parol proof. Thus, where the consideration in a deed conveying lands was expressed to be money paid, it was held, that parol evidence was admissible to show that the consideration, instead of money, was iron of a specified quantity, valued at a stipulated price. *McCrea v. Purmort*, 16 Wendell, 460
37. (*Same.*) It seems, according to the American cases, that the only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration; and that for every other purpose it is open to explanation, and may be varied by parol proof. *Ib.*
38. (*Best evidence.*) A party who has performed labor for another, cannot, in an action to recover for such work, produce in evidence check-rolls or accounts of the number of days' work performed by those in his employment, for the purpose of fixing the amount of labor done, without verifying the same by the oath of the agent who made the entries, or kept the accounts, if such agent be living. *Merrill v. Ithaca Railroad Co.*, 16 Wendell, 586.
39. (*Original entries.*) If the agent be dead at the time of the trial, original entries made by him in the usual course of business may be produced in evidence; but the mere fact that he is absent from the state, so as to be beyond the reach of the process of the court, will not entitle the party to give such entries in evidence. *Ib.*
40. (*Same.*) When original entries are produced, and the person who made them, or saw them made by another, knowing them at the time to be true, testified that he made the entries or saw them made, and that he believes them to be true,

although, at the time of his testifying, he has no recollection of the facts set forth in the entries, such evidence is admissible and *prima facie* sufficient to establish the facts evidenced by the entries. Such proof, however, it seems, will not be received, where only a copy of the original entries is produced. *Ib.*

41. (*Witness's impression.*) A witness called to authenticate a paper, cannot be asked whether to the best of his impression, the paper is in the handwriting of the party. *Carter v. Connell*, 1 Wharton, 392.
42. (*Copies of old maps, &c.*) Copies of old maps and plans of the city of Philadelphia, in the office of the surveyor general, and certified by him, held to be admissible in evidence, on a question of the title to an open square in the city. *Commonwealth v. Alburger*, 1 Wharton, 469.
43. (*Same.*) The "list of first purchasers," with the advertisement annexed, held to be admissible in evidence on the same question. *Ib.*

EXCHANGE.

- (*Of personal property.*) An exchange of personal property has all the qualities of a sale, to which payment or delivery is essential; and which, without it, is but an executory agreement to sell which does not bind the property. *Hazard v. Hamlin*, 5 Watts, 201.

EXECUTORS AND ADMINISTRATORS.

1. (*Purchase of claims against the estate by.*) A trustee, executor, or administrator, is not permitted to raise in himself an interest opposite to that of the party for whom he acts, nor to traffic in the estate for his own emolument—and if he buys a debt against the person or estate for which he acts, he can claim nothing more than a remuneration. *Mitchum's heirs v. Mitchum's admr's, &c.*, 3 Dana, 265.
2. (*Same.*) Where an executor or administrator and a stranger unite and make a joint purchase of a debt due from the decedent, at a discount, they stand together upon the same footing that the executor or administrator would occupy, if he alone had made the purchase: they can hold the estate accountable for the amount of their purchase, and no more. *Ib.*

3. (*Interest.*) Administrators may be charged with extra interest received by them, upon funds of the estate, loaned ; but proof of an agreement for extra interest, not actually received, will not authorize the charge. *White's heirs v. White's adm'rs*, 3 Dana, 376.

FAILURE OF CONSIDERATION.

1. (*In action on promissory note.*) Where it appeared in an action on a promissory note, that the note was given for land sold to the defendant ; that a deed with covenants was given, which was utterly void and conveyed no title whatever ; and that a part of the purchase money was paid ; it was held, that there being an entire failure of title, there was also a total failure of consideration for the note, and this was an answer to the action. *Cook et al. v. Mix*, 11 Conn. 432.
2. (*Same.*) But if the covenants in the deed formed a consideration for the note, so that there was only a partial failure of consideration ; it was held, that this might be shown to reduce the damages. *Ib.*

FALSE IMPRISONMENT.

- (*What.*) It is false imprisonment to detain another by threats of violence to his person, or to deprive him of the freedom of going where he will by the well-grounded apprehension of personal danger, though no assault is committed, *Johnson v. Tompkins et al.*, 1 Baldwin, 600.

FIXTURES.

1. (*Removal of.*) Even as between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term : after the expiration of the term, the tenant can neither remove them nor recover their value from the landlord. *White v. Arndt*, 1 Wharton, 91.
2. (*Same.*) This rule prevails more strictly between tenant for life or his lessee, and the remainder-man ; the latter of whom is not bound by any agreement between the tenant for life and his lessee, under which the lessee may have erected buildings on the land. *Ib.*

FOREIGN ATTACHMENT.

- (*Legacy.*) A legacy in the hands of executors is not the subject

of foreign attachment for a debt due by the legatee, unless the executors have assented to the legacy, or where, sufficient assets being admitted to be in the hands of the executors to pay him, the legatee prior to the attachment had tendered an adequate refunding bond. *Shewell v. Keen*, 1 Miles, 186.

FOREIGN MINISTER.

1. (*Execution of process against.*) Any person who executes process on a foreign minister is to be deemed an officer under the twenty-sixth section of the act of 1790. *United States v. Benner*, 1 Baldwin, 240.
2. (*Same.*) To support an indictment under this law it is not necessary that the defendant should know the person arrested to be a foreign minister. *Ib.*
3. (*Waiver of privilege by.*) A foreign minister cannot waive his privileges or immunities, his submission or consent to an arrest is no justification. *Ib.*
4. (*Assault by.*) An assault committed by him may be repelled, in self-defence, but does not justify an arrest on process. *Ib.*
5. (*Attaché.*) An attaché to a foreign legation is a public minister within the act of congress. *Ib.*

FRAUD.

1. (*False representation.*) An action can be maintained for a false and fraudulent representation of the responsibility of a person, whereby an injury has been sustained by the one to whom it is made. *Weeks v. Burton*, 7 Vermont, 67.
2. (*Same.*) A representation that a note is good is equivalent to representing that the maker is responsible. *Ib.*
3. (*Innocent purchaser.*) Although a sale of land by an executor, in pursuance of powers contained in a will, may be fraudulent and void as respects the purchaser, because of his having been a party to the fraud, yet as respects a subsequent and innocent purchaser from him, the title will be good. *Price v. Junkin*, 4 Watts, 85.
4. (*Mortgage obtained by.*) When a mortgage is obtained by the misrepresentation of the mortgagee, it is void; and it is immaterial as to its legal effect upon the instrument, whether the mortgagee at the time he made the misrepresentation knew it to

be false. If he made a statement of facts, knowing it to be false, it would clearly be a legal fraud; but although he did not know that it was false, yet, if he undertook to state it to be true, without a knowledge of its truth or falsehood, and it operated as a deception to the other party to whom it was made, and thereby induced the mortgage, it would avoid it. The gist of the inquiry is, not whether the party making the statement knew it to be false, but whether the statement made as true, was believed to be true, and therefore, if false, deceived the party to whom it was made. *Joice et ux. v. Taylor*, 6 Gill and Johnson, 54.

FRAUDS—STATUTE OF.—(In Maine.)

(*Executed contracts.*) The clause in the statute of frauds relating to contracts for the sale of goods of the price of \$30 or more, has reference to executory contracts, and not to contracts executed. *Bucknam v. Nash et al.*, 3 Fairfield, 474.

FRAUDULENT CONVEYANCE.

1. (*As between parties.*) A conveyance made with intent to defraud creditors, as between the parties, stands on the same ground as if it were *bona fide* and for an adequate consideration; and neither at law nor in chancery, can the grantee be compelled to reconvey. *Chapin v. Pease*, 10 Conn. 69.
2. (*Against wife's claim to alimony.*) A wife has a lawful claim upon her husband for her maintenance; and if, during the pendency of her petition for a divorce and alimony, a conveyance of his land be executed by the husband in order to defraud his wife of her right to a support, and be received by the grantee with the same fraudulent design, the conveyance as to her is void. *Frakes v. Brown*, 2 Blackford, 295.

GUARDIAN AND WARD.

1. (*Settlement.*) An infant, after his guardian's death, has a right to compel a settlement of his accounts as if he were of age; the guardian's trust being personal, and terminating at his death. *Peck et al. v. Braman et al.*, 2 Blackford, 141.
2. (*Account.*) In the case of a guardianship until the ward is of full age, the general rule is, that the ward must be of age before he can require his guardian to account; yet, in chancery,

a ward may, during his minority, call such a guardian to account, if any thing should occur which makes it necessary. *Ib.*

GENERAL AVERAGE.

1. (*Wages and provision.*) Where a ship, bound from R. to B., was compelled to put into an intermediate port, for the preservation of the ship, cargo, and lives of the crew, the wages and victualling of the crew, from the time of the ship's bearing away for such intermediate port until her departure therefrom, were held to constitute a proper subject of general average. *Thornton v. U. S. Insurance Company*, 3 Fairfield, 150.
2. (*Where no possibility of saving vessel.*) In the case of a voluntary sacrifice of a cargo of lime, for the preservation of the vessel, by scuttling her, the court held, that the owners of the cargo had no claim against the owners of the ship for contribution upon the principle of general average, if at the time of the sacrifice of the cargo there was no possibility of saving it. *Crockett v. Dodge*, 3 Fairfield, 190.

GAMING.

- (*Consideration.*) If a party wins at an unlawful game, and, to evade the effect of the statute, takes property in payment, which he sells back to the loser, and takes his note for it, the sale will be disregarded, and the note will be deemed to have been given on a gaming consideration. *Bell v. Parker*, 3 Dana, 51.

HIGHWAY.

- (*Fee of.*) The proprietors of land adjoining a highway, have *prima facie* at least, a fee in such highway, *ad medium filum viæ*, subject to the easement. *Chatham v. Brainerd et al.*, 11 Conn., 60.

HUSBAND AND WIFE.

- (*Estate conveyed to husband for joint benefit.*) An estate conveyed to a husband, for the joint benefit of himself and wife, without words limiting a trust for the separate use of the wife, but excluding the husband from power to sell, may be sold under execution as the estate of the husband. *Stoebler v. Knerr*, 5 Watts, 181.

IMPEACHMENT OF WITNESS.

(*Inquiry for the purpose of.*) To impeach a witness, the inquiry must be as to character for truth and veracity; and no inquiry can be had whether a witness is a common prostitute. *State v. Smith*, 7 Vermont, 141.

(See also, *Comm'th v. Murphy*, 14 Mass. Rep., 387; *Comm'th v. Moore*, 3 Pick. Rep., 194; *Jackson v. Lewis*, 13 John. Rep., 504.)

IMPROVEMENTS.

(*On land,—value of.*) Improvements are to be valued, not at the cost, or their value when new, but at what they are worth when the valuation is made; the difference in the present price of the land, with them, and without them, is the true sum of their value. *Haskins, &c. v. Spiller*, 3 Dana, 575.

INDEMNIFICATION.

(*Good consideration.*) A deed executed to indemnify indorsers, who became such for the grantor at his request, is founded upon a good consideration, and vests his interest and estate in, and title to, the property conveyed, in the grantees, until it has performed its office of indemnifying them from responsibility; it cannot be impeached at the instance of a creditor, whose pretensions can only be considered equally meritorious. *Griffith v. Frederick County Bank*, 6 Gill and Johnson, 424.

INDENTURE.

(*Of apprenticeship by minor.*) The execution of an indenture of apprenticeship by a minor, without the consent of his guardian, is null and void; and if the covenants be not complied with on his part, no action will lie against him for the breach of it. *Guthrie v. Murphy*, 4 Watts, 80.

INDICTMENT.

1. (*Conclusion of.*) A conclusion of an indictment against the form of the statute (in the singular) is sufficient in all cases, where the offence is distinctly within more than one independent statute. *United States v. Gibert*, 2 Sumner, 19.
2. (*Same.*) Also a conclusion against the form of the statutes (in the plural) would be good, even if the offence were punishable by a single statute only. *Ib.*

INJUNCTION.

(*Of judgment.*) A judgment at law may be enjoined in part in equity, and when the circumstances require it, a court of equity should perpetuate the injunction as to part, and dissolve it as to the residuo. *Lyles v. Hatton*, 6 Gill and Johnson, 122.

INSOLVENTS.

1. (*Voluntary assignment.*) A voluntary assignment in contemplation of insolvency and preferring creditors, made in Pennsylvania, will not be sustained in Delaware as against a subsequent attachment, by a citizen of that state, of the insolvent's effects there. *Mayberry & Co. v. Shissler*, 1 Harrington, 349.
2. (*Same.*) If by such assignment a benefit is reserved to the assignee to the prejudice of his creditors, it vitiates the deed. *Ib.*
3. (*Discharge under.*) A discharge under the insolvent laws of New York prevents the arrest of the debtor in Delaware, if the debt arose in N. Y. *Bailey v. Seal's bail*, 1 Harrington, 367.

INSOLVENT LAW.

1. (*Discharge under that of Maryland.*) A discharge under the insolvent law of the state of Maryland (which is partly in the nature of a bankrupt law), is not a bar to a recovery on a cause of action existing previous to such a discharge, where the plaintiff, at the time of the contract and of the institution of the suit, is an alien and foreign subject. Nor is the discharge a bar, where the plaintiff brings his action on a judgment recovered on the same cause of action in the circuit court of the United States in Maryland. *Hobblethwaite v. Batturs*, 1 Miles, 82.
2. (*Effect of.*) A debtor was discharged, under an insolvent law of Ohio, as to the imprisonment of his person, from a debt due to the payee on a promissory note. The parties resided in Ohio, and the debt was there contracted. Held, that the debtor might plead the discharge, so far as respected the imprisonment of his person, in bar of an action brought against him in Indiana on the note by an assignee thereof. *Pugh v. Bussel*, 2 Blackford, 366.
3. (*Same.*) A, having become indebted to B, in the state of Ohio where they both resided, gave his note to B for the debt,

dated in 1821. In 1823, the parties being still resident in Ohio, A took the benefit of the insolvent law of that state, and was discharged, so far as respected arrest and imprisonment, from all his debts, that of B among the rest. Afterwards, A removed to Indiana; and, to an action against him on the note, brought by C, the assignee of B, he pleaded—in discharge of his person from arrest or imprisonment for the debt—his above-mentioned discharge in Ohio. Held, on general demurrer, that the plea was good. *Ib.*

INSURANCE.

1. (*Memorandum clause.*) The effect of the memorandum clause in policies is not to enlarge the perils underwritten against, but to exempt the underwriters from certain losses, within those perils. *Potter v. Suffolk Ins. Company*, 2 Sumner, 197.
2. (*Stranding.*) To constitute a stranding, within the policy, the vessel must be on the strand under extraordinary circumstances. *Ib.*
3. (*Loss by ebbing of tide.*) A loss by the ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. *Ib.*
4. (*Abandonment.*) An abandonment once made is considered as a continuing abandonment, notwithstanding a refusal to accept it, unless it is withdrawn by the party offering it. *The Brig Sarah Ann*, 2 Sumner, 206.
5. (*Seaworthiness.*) There is no rule or presumption of law, which makes the seaworthiness of a vessel at the commencement of the voyage *prima facie* evidence, that the subsequent repairs, necessary to be made during the voyage, arose from some extraordinary peril. Otherwise, the underwriters might be made liable for losses for mere wear and tear. *Donnell v. Columbian Ins. Company*, 2 Sumner, 366.
6. (*Meaning of words "in each case."*) In a policy of insurance, it was stipulated, that the underwriters shall not be liable "for any partial loss on other goods, or on the vessel and freight, unless it amount to five per cent. exclusive in each case of all charges and expenses incurred for the purpose of ascertaining and proving the loss;" Held, that the words "in each case,"

in the foregoing clause, do not mean "at each time of loss," but that they refer to the three several subjects insured, goods, freight, and vessel, and require a damage of five per cent. to justify a claim in each case. *Ib.*

7. (*By agent.*) Where an insurance was effected by an agent, for the benefit of whom it concerned, and a loss was incurred, and the agent brought an action against the underwriters in his own name, for the benefit of the owners of the ship, held, that the underwriters could not set off debts or demands due from the agent in his own right, against the amount claimed for the loss. *Hurlbert v. Pacific Ins. Company*, 2 Sumner, 471.
8. Losses by "danger of the seas" are such as are of an extraordinary nature, or arise from irresistible force, which cannot be guarded against by the ordinary exertions of human skill and prudence. The mere rolling of a vessel by a cross sea is not such a danger. *The Schooner Reeside*, 2 Sumner, 567.
9. (*Construction of clause restricting alienation.*) In a policy of insurance against fire, it was stipulated, that, "when the property insured should be alienated, by sale or otherwise, the policy should thereupon be void." The insurance was on a store and two hundred dollars on the stock of goods therein, for the period of six years. During the existence of the policy, the assured sold all the goods and leased the store by parol to the purchaser; who continued to occupy the same, selling the goods for about six months; when the assured took back both the store and the remaining stock of goods. Held, that this was not an alienation of the store within the meaning of the policy. *Lane v. Maine Fire Insurance Company*, 3 Fairfield, 44.
10. (*Insurable interest.*) A party in possession of a dwelling-house, under a valid subsisting contract of purchase, although he has not paid the whole consideration money, has an insurable interest; and if he apply for insurance, representing the house as his, and it is described in the policy as his dwelling-house, is not guilty of a misrepresentation or breach of warranty so as to avoid the policy. *The Aetna Fire Insurance Company v. Tyler*, 16 Wendell, 385.

11. (*Where property insured is sold.*) Policies against fire are personal contracts, with the assured, and do not pass to a purchaser of the property insured or to an assignee, without the consent of the underwriters; if the assured sell the property and part with all his interest therein before the loss happen, the policy is at an end unless it be assigned to the purchaser; if he retain a partial interest in the property, the policy will protect such interest. *Ib.*
12. (*Warranty.*) A warranty on the part of the assured, whether express or implied, is in the nature of a condition precedent, and must be strictly complied with or the policy is void; not so as to a representation, in respect to which the rule is that the policy is valid unless the representation is false or mistaken in a matter material to the risk. *Farmers' Insurance and Loan Company v. Snyder*, 16 Wendell, 481.
13. (*Seaworthiness.*) The want of seaworthiness in a vessel, at the commencement of the voyage, will be a sufficient defence to the insurers on the vessel, although she arrived in safety at her port of destination. *Prescott v. The Union Insurance Company*, 1 Wharton, 399.

INTEREST.

1. (*Account current.*) An account current received and not objected to in a reasonable time becomes a settled account, bearing interest from the time it is stated, and the balance is payable on demand. *Bainbridge & Co. v. Wilcox*, 1 Baldwin, 538.
2. (*Same.*) An account made up of principal and interest becomes one principal debt when settled, the aggregate balance bearing interest. *Ib.*
3. (*Compound.*) Compound interest is not illegal, and may be recovered on an express promise, or one implied by law, as a part of the contract. *Ib.*
4. (*Usury.*) An agreement to pay interest on interest which has become due, is not usurious. *Camp v. Bates*, 11 Conn. 487.
5. (*Addition of to principal.*) If a new contract be made respecting money previously lent and a new security be given, the interest should be calculated up to the time of the new contract and added to the principal; but this calculation is not to

be made at every agreement for forbearance of payment where no change is made in the securities. *Harvey v. Crawford et al.*, 2 Blackford, 43.

6. (*Same.*) Whenever a sufficient payment is made, the interest must be first discharged; but if the payment be less than the interest, the balance of the interest does not become principal. *Ib.*
7. (*On note drawn in New York.*) Seven per cent. interest allowed in Delaware on a note drawn in New York. *Bailey v. Seal*, 1 Harrington, 232.
8. (*On rent reserved.*) Where a money rent is reserved in a lease of land, payable on a certain day, and is not paid, it carries interest as a matter of right. *Denison v. Lee and Wife*, 6 Gill and Johnson, 383.
9. (*Same.*) A distress can only be made for the rent itself—interest on rent in arrear cannot be distrained for—but in an action of debt for rent, interest is recoverable. *Ib.*

JAILER.

(*Liability to sheriff.*) If a jailer suffer a prisoner to escape, without the sheriff's knowledge, and the sheriff be thereby made responsible, the jailer is liable to him in an action on the case. Nor will it relieve the jailer from liability that he took advice and acted with good faith in the matter. *Duncan v. Klenefelter*, 5 Watts, 141.

JURISDICTION.

1. (*Change of domicil.*) Where the parties are citizens of different states, at the commencement of the suit, a subsequent change of domicil and citizenship will not oust the jurisdiction. *Clarke v. Mathewson*, 2 Sumner, 262.
2. (*Same.*) If a citizen removes from one state to another, in order to prosecute suits in the courts of the United States, provided the removal be real, the motive of the act cannot be inquired into. *Briggs v. French*, 2 Sumner, 252.
3. (*Homicide committed in foreign port.*) A gun was fired from an American ship, lying in the harbor of Raiatea, one of the Society Isles and a foreign government, by which a person on board a schooner, belonging to the natives and lying in the

same harbor, was killed. Held, that the act was, in contemplation of law, done on board the foreign schooner, where the shot took effect, and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States under the crimes act of 1790, ch. 36, § 12. *United States v. Davis*, 2 Sumner, 482.

4. (*Fugitive offender.*) An offender, escaping into Canada, and brought back against his will, and without the assent of the authorities of the province, may yet be tried and punished for the offence committed here. *State v. Brewster*, 7 Vermont, 118.
5. (*In action on book.*) The debit side of the plaintiff's book, as presented by him to the justice, is by inspection to determine the jurisdiction in the action on book. *Stone v. Wilson*, 7 Vermont, 338.
6. (*Same.*) Because there is another item which he might charge, whether interest or any thing else, which if charged would make the account exceed one hundred dollars, that does not take the case out of the justice's jurisdiction. *Ib.*

JURISDICTION OF CIRCUIT COURTS.

1. (*Citizenship.*) A citizen of New York obtained a judgment against a citizen of Pennsylvania in a court of the state, which the plaintiff assigned to a citizen of Pennsylvania, whose executors assigned it to the complainant, an alien. Held, that he could sustain a bill in equity in this court notwithstanding the intermediate assignment to a citizen of Pennsylvania. *Wilson v. Fisher's ex'r*, 1 Baldwin, 135.
2. (*Same.*) This court has jurisdiction of an action of debt on a judgment obtained in a state court obtained by a citizen of another state. *Barr and Auchincloss v. Simpson*, 1 Baldwin, 543.

JURY, POWER AND DUTY OF.

1. In the case of the *United States v. Wilson*, Mr Justice Baldwin addressed the following remarks to the jury:—

“ We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case ; but you

will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time, it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so; when the law is settled by a court, there is more certainty than when done by a jury, that it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject—by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake.” *United States v. Wilson and Porter*, 1 Baldwin, 99.

The same judge, in the case of the *United States v. Porter*, referred to the foregoing remarks and added:—

“In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defence.

“You may find a general verdict of guilty or not guilty, as you think proper, or may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply to the case.

“But if a jury find a prisoner guilty against the opinion of the

court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; the court do not act, and cannot judge, there remaining nothing to act upon." *Ib.*

2. The doctrine, thus directly asserted by one of the justices of the supreme court of the United States, is as pointedly denied by another. In the case of the United States v. Battiste, Mr. Justice Story, in summing up to the jury, said:—

"Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost

impracticable to ascertain, what the law, as settled by the jury, actually was. On the contrary, if the court should err, in laying down the law to the jury, there is an adequate remedy for the injured party, by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought, that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion." *United States v. Battiste*, 2 Sumner, 240.¹

LANDLORD AND TENANT.

(*Evidence in ejectment.*) In an action of ejectment by the heirs at law of a landlord against a tenant, it is competent for the defendant to give evidence, that the landlord was only seised of a life estate, which terminated by his death before action was brought. *Heckart v. McKee*, 5 Watts, 385.

LAW AND FACT.

(*Province of jury.*) The interpretation of a paper, as to its legal effect, belongs to the court, but as evidence of a fact it belongs to the jury. Hence, the facts stated in a protest by a notary public are, like any other evidence, to be interpreted by the jury. *McGee v. Northumberland Bank*, 5 Watts, 32.

¹ The question of the power of juries, thus distinctly presented by the conflicting opinions of two learned judges of the highest court in the United States, is, for that reason alone, if there were no other, well worthy of consideration. It is, however, in itself a most interesting subject, and, in the practical administration of justice, a most important one. We intend, in some future number of the Jurist, to devote an article to it.

LEGACY.

(*Children and grandchildren.*) Where it is necessary to effectuate a manifest intent, grandchildren may take by the designation of children; but a bequest of a residue "to be divided amongst all my children, their heirs or assigns, in equal shares," will not include the children of a deceased son of the testator. *Dickinson v. Lee*, 4 Watts, 82.

LEGATEES.

1. (*Joint.*) A legacy to three sisters of the plate, musical instruments, pictures, &c. which belonged to their father, gives them a joint tenancy in the goods bequeathed. *Minot's ex'r v. Richards*, 7 Vermont, 203.
2. (*Same.*) Where two of the legatees died in the life of the testatrix, held that the legacy survived to the remaining legatee, and did not pass to the residuary legatee, under a bequest of the residuum and of all lapsed legacies. *Ib.*

LEX LOCI.

1. (*Validity of contract.*) The validity of a contract depends on the law of the country where it is made, unless it is to be performed elsewhere. *Harman v. Harman*, 1 Baldwin, 130.
2. (*Forms of execution.*) The forms of execution are governed by the local law where it is made. *Ib.*
3. (*Same.*) But when it is made with reference to the performance of an act in another country, which is regulated by its laws, it must be executed with the formalities required where it is to be performed. *Ib.*
4. (*Rights, &c.*) The obligation and rights of the parties to a contract are governed by the law of the country where the contract is to be executed. *Bainbridge & Co. v. Wilcocks*, 1 Baldwin, 537.
5. (*Remedies.*) The remedies to enforce a contract are governed by the law of the country in which the suit is brought. *Ib.*

LIBEL.

(*Province of jury.*) In an action on the case for a libel, it is the province of the jury and not of the court to construe words of dubious import; and they are to be interpreted, not by the

norma loquendi, but by the sense in which they were actually uttered. *Hays v. Brierly*, 4 Watts, 392.

LICENSE.

(*Parol agreement.*) Where A sold and conveyed land to B, by deed, and there was, at the same time, a parol agreement between them, that A should have free ingress and egress to take and remove certain articles of personal property belonging to him, and to remain in possession, for that purpose, a reasonable time; in an action of trespass *quare clausum fregit*, brought by B against A, it was held, that such agreement amounted to a license, and neither affected, nor was affected by, the deed; consequently, parol evidence was admissible to prove it. *Parsons et al. v. Camp et al.*, 11 Conn. 525.

LIEN.

1. (*On debt barred by statute of limitations.*) Where the security for a debt is a lien on property, personal or real, that lien is not impaired, in consequence of the debt's being barred, by the statute of limitations. *Belknap, adm'r v. Gleason*, 11 Conn. 160.
2. (*Lost property.*) The finder of lost property has no lien for expenses gratuitously incurred in taking care of it. *Etter v. Edwards*, 4 Watts, 63.

LIMITATION OF ACTIONS.

1. (*Discharge under insolvent acts.*) A discharge of the person of a debtor, under the insolvent laws of Pennsylvania, does not prevent the operation of the statute of limitations against the claim of the creditor. *Sletor v. Oram*, 1 Wharton, 106.
2. (*Acknowledgment of executor.*) An executor or administrator, sued, in his representative character, for a debt due by the decedent, may plead the statute of limitations as a bar to the action; although such executor or administrator may have made such an acknowledgment of the debt, as, in the case of a person sued for his own debt, would be sufficient to take the case out of the statute. *Eritz v. Thomas*, 1 Wharton, 66.

LOTTERY.

(*Tickets—Merchandise.*) Lottery tickets are regarded as an

article of merchandise, and chargeable in a book account for the purposes of evidence. *Bailey v. M^r Dowell*, 1 Harrington, 346.

LUNATIC.

(*Non compos mentis*—*what*.) A return of an inquisition, held by virtue of a commission in the nature of a writ *de lunatico inquirendo*, that the party, "by reason of old age and long-continued sickness, has become so far deprived of reason and understanding, as to be wholly unfit to manage his estate," is not a sufficient finding that the party is "*non compos mentis*;" within the constitution and laws of Pennsylvania. *Beaumont's Case*, 1 Wharton, 52.

MERGER.

(*Mortgage interest*.) A testator by his will disposed of his estate, real and personal, and, by a codicil, directed his executor to purchase a certain tract of land, upon which he held a mortgage, if it sold for an amount less than the mortgage debt. Before his death he purchased the equity of redemption, and subsequently died without altering his will: Held, that such purchase did not merge in it the qualified legal title existing in the testator at the making of the will, so as to give him the estate by relation; and that as he died intestate of it, it descended to his heirs at law and did not go to his executors. *Scott v. Sample*, 5 Watts, 53.

MORTGAGE.

1. (*Duty of mortgagee*.) A mortgagee is bound to make all reasonable and necessary repairs upon the mortgaged premises while in his possession, and will be responsible for the damage occasioned by any wilful default or gross neglect in this respect. The natural effects of waste and decay, from time, he will not be bound to repair. *Dexter v. Arnold*, 2 Sumner, 108.
2. (*Rents and profits; duty of master*.) A mortgagee, who keeps no accounts of the rents and profits received by him, is properly chargeable with what he may be presumed to have received, and, if in the occupation of the premises, also with an occupation rent. And the master was right in embracing all these items in an account of rents and profits received. *Ib*.

3. (*Same.*) Where a mortgagee has kept no accounts of the rents and profits received by him, the master will exercise a sound discretion upon the whole evidence with regard to the amount for which he should be charged, without resorting to the standard of an occupation rent. *Ib.*
4. (*Proof of debt.*) Although a mortgagee, suing in ejectment, must prove his debt, in order to recover, yet a mortgagee in possession, who sues a stranger in trespass or case for a nuisance, need not show his note or bond secured by the mortgage. *Hull v. Fuller*, 7 Vermont, 100.
5. (*Exchange of notes.*) B. held certain promissory notes against W. which were secured by a mortgage on real estate. These notes were afterwards given up to W. upon his executing new notes for the sum due, but without any intention on the part of B. to affect his mortgage security. Held that this exchange of notes did not defeat the mortgage, so as to enable the creditors of W. to levy upon and hold the land against B. :—especially, as it did not appear that they had been misled, or induced to believe the mortgage debt actually paid. *Dana et al. v. Binney et al.*, 7 Vermont, 493.
6. (*Waste by mortgagee in possession.*) A mortgagee in possession is chargeable with waste ; but what is waste, and what is not, as respects the clearing of timber land, must depend upon the particular circumstances of the case. *Givens v. M^cCalmont*, 4 Watts, 460.
7. (*Of personal property.*) A mortgagee of personal property can maintain an action against one attaching the goods as the property of the mortgagor, though there be a stipulation in the mortgage, that the mortgagor shall retain the possession of the property and sell it for the purpose of paying the mortgage debt. *Melody v. Chandler*, 3 Fairfield, 282.

NAMES.

- (*Letter between christian and surname.*) An initial letter interposed betwixt the christian and surname, is no part of either. *Bratton v. Seymour*, 4 Watts, 329.

NEGLIGENCE.

- (*Leaving a horse unfastened.*) A person leaving his horse stand-

ing unfastened, or unheld, in a populous place, is guilty of gross negligence, for which he is responsible to the party injured, although the qualities and habits of the animal are such as to induce the belief of perfect safety in so doing; and evidence of the latter, in an action for an injury sustained in consequence of such negligence, if given in the cause, must be disregarded by the jury. *Overington v. Dunn*, 1 Miles, 39.

NEGOTIABLE NOTE.

(*Given for goods previously purchased.*) If a negotiable note be given for goods which had been previously purchased and charged to the purchaser, a recovery cannot be had in an action on the original contract without producing the note, or satisfactorily accounting for its absence or proving its loss.

Hays v. McClurg, 4 Watts, 452.

NEGROES AND SLAVES.

1. (*Deeds of manumission.*) Deeds of manumission are not exceptions to the general rule, that the existence of a deed may be presumed under circumstances. *Burke v. Negro Joe*, 6 Gill and Johnson, 136.
2. (*Same.*) The presumption of a deed to give freedom, must be founded on acts inconsistent with a state of slavery, known to the owner, and which can only be rationally accounted for, upon a supposition that he had intended to free his slave. *Id.*

NEW TRIAL.

1. (*In capital cases unconstitutional.*) The prohibition in the constitution of the United States, "nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb," means that no person shall be tried a second time for the same offence, after a trial by a competent and regular jury, upon a good indictment, whether there be a verdict of acquittal or conviction: therefore, the circuit court of the United States cannot grant a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment. *Davis, J.*, dissenting, held that the privilege intended to be secured by the prohibition, might be waived by the prisoner. *Quære*—if this prohibition extends to the state courts? *United States v. Gibert*, 2 Sumner, 19.

2. (*Point of law.*) A point of law not made and overruled, on the trial of the cause, is not a ground for a new trial. *Torry v. Holmes et al.*, 10 Conn. 499.

OFFICERS.

1. (*Action by for taking of goods.*) The right of an officer to bring an action, for goods levied upon by him, depends upon his special property and liability over; if the process be void, he cannot maintain an action for the taking of the goods. *Earl v. Camp*, 4 Wendell, 562.
2. (*Same.*) And although in general, in such action in a suit against a stranger for the taking of goods, it is sufficient to show an execution or process, levy and possession under it, still if the defendant can show the proceedings on the part of the plaintiff in the process void, the plaintiff cannot sustain his suit. *Ib.*

OHIO RIVER.

(*Jurisdiction of.*) The Ohio river, so far as it is the boundary of Kentucky, is within her jurisdiction; a concurrent jurisdiction being reserved to the states on the opposite side—and the use and navigation free to all the citizens of the United States; and the laws of Kentucky, not in conflict with the rights thus conceded, operate on that part of the river, from shore to shore. The acts of 1824 and 1828, to prevent slaves being carried away as passengers in boats, are not in conflict with the concurrent jurisdiction of other states, nor with the free and common right to the use, &c. of the Ohio river—and are valid acts. *Church, &c. v. Chambers*, 3 Dana, 278.

OPINION OF THE COURT.

(*On testimony.*) The court are not under obligation to give any opinion to the jury on the weight of testimony. *Vincent v. Stinehour*, 7 Vermont, 62.

PARENT AND CHILD.

(*Services of children.*) A father may claim the services of his children, whilst they are under lawful age and are supported by him. But should he, at any time, relinquish that claim, the profits of his children's labor then belong to themselves, and

cannot be seized by the creditors of the father. *Jenison et al. v. Graves et al.*, 2 Blackford, 440.

PARTITION.

(*Presumption of.*) A partition may be presumed from a long several holding by heirs of land descended to them from a common ancestor. *McCall v. Reybold*, 1 Harrington, 146.

PARTNERS AND PARTNERSHIP.

1. (*Transfer of debt by firm to one.*) The several members of a firm cannot transfer to one of them their separate interests in a joint debt, so as to enable him to sue and recover it in his own name. The original relation of debtor and creditor cannot be changed without the consent of the debtor. *Horback v. Huey*, 4 Watts, 455.
2. (*Evidence.*) One who is interested as a partner, though not named on the record, cannot be made a witness merely by a release of his interest in the subject matter of the action; being still liable for the costs. *Culbertson v. Alexander*, 5 Watts, 496.
3. (*Note in name of firm by one of its members.*) A note given in the name of a firm by one of its members for moneys collected by him as the agent of the payee, is a valid note against the firm, where the moneys thus collected were in the nature of a loan to the firm. *Whitaker v. Brown*, 16 Wendell, 505.
4. (*Same.*) A note given by one of several partners in the name of the firm, is of itself presumptive evidence of the existence of a partnership debt; and if the other partners seek to avoid its payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that with the knowledge of the payee. *Ib.*
5. (*Attachment for private debt.*) A creditor attaching the goods of a partnership, to secure a debt against one of the partners, can take only the interest of that partner in such goods; which is only his share of what remains after the partnership accounts are taken. *Witter v. Richards*, 10 Conn. 37.
6. (*Private debt of one partner.*) A firm cannot be charged with a debt contracted by one of the partners before the partnership was constituted, although the subject matter which was the consideration of the debt, has been carried into the partnership as

stock. Nor can the firm be charged with rent which accrued upon a lease to one of the partners. *Brooke v. Evans*, 5 Watts, 196.

7. (*Dormant partner.*) If a partner borrow money and give his individual note for it, it does not become a partnership debt, by reason of the application of the money to partnership purposes. But if there be a dormant partner the law is otherwise, and the firm is chargeable with the debt, if the money was applied to the business of the partnership. *Graff v. Hitchman*, 5 Watts, 454.
8. (*Debt of separate partner.*) The doctrine—that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged—is correct; but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only, when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *M^r Donald et al. v. Beach et al.*, 2 Blackford, 55.
9. (*Same.*) Those equitable principles operate on the property remaining in the possession of the partners, and embrace all that has been fraudulently disposed of; but they do not extend to such as has been previously transferred by the firm in good faith. *Ib.*
10. (*Payment to one partner.*) Payment of a debt to one partner of a firm is good against the other partners; and a release by one partner to a debtor of the firm is obligatory on the others. *Yandes et al. v. Lefavour et al.*, 2 Blackford, 371.
11. (*Admission of one.*) The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is not binding on the other partners. *Ib.*
12. (*Acknowledgment by one.*) An acknowledgment of a debt, made by one partner after a dissolution of the partnership, is not sufficient to take a case out of the statute of limitations as to the other partners. *Ib.*
13. (*Liability of dormant partner.*) The liability of a dormant partner to creditors may be avoided by proof of fraud in the

formation of the partnership, if no part of the funds have been received by such dormant partner. *Mason v. Connell*, 1 Wharton, 381.

14. (*Formed by articles.*) It seems that a partnership formed by articles for a definite period, may be dissolved by either partner before the termination of the period. *Ib.*

15. (*Introduction of stranger.*) One partner cannot, without the consent of the other, introduce a stranger into the firm, nor can he, without such consent, make the other partner a member of another firm; but such consent may be implied from the acquiescence and acts of the parties; and if such other partner is made acquainted with the facts, he ought to dissent from the arrangement; otherwise he will be bound by it. *Ib.*

PAYMENT.

(*Money paid on account.*) If money be paid on an account, and there be no application of it, at the time of payment, by either party, the law will apply it to those items in the account which first accrued. *Fairchild et al. v. Holly et al.*, 10 Conn. 175.

PERSONAL PROPERTY.

(*Transfer of, how made available.*) In order to make a transfer of personal property available against creditors or a subsequent assignee, it must be accompanied by a change of possession, at the time, or within a reasonable time thereafter. If it has been delayed an unreasonable time, it is not sufficient that the possession was changed before a levy made. *Carpenter v. Mayer*, 5 Watts, 483.

PIRACY.

(*What constitutes.*) In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design, and the officers and crew have known and acted upon such design; otherwise those only are guilty, who actively co-operated in the piracy. *United States v. Gibert*, 2 Sumner, 19.

PLEDGE.

(*Property.*) The absolute right of property and the right of possession in a note, which had been pledged for the payment of a debt, become, on payment of the debt, vested in the pledgor;

and if the note be afterwards converted by the pledgee to his own use, he is liable to the pledgor in an action of trover. *El-liott v. Armstrong*, 2 Blackford, 198.

POSSESSION.

1. (*Of part of land conveyed.*) A party, taking possession of a part of land conveyed by his deed, is in legal construction in possession of all the land described. But it is necessary that the deed give a definite and certain extent to the land, otherwise he will be deemed in possession only to the extent of his actual possession. *Hull v. Fuller*, 7 Vermont, 100.
2. (*Statutes of fraud.*) The possession contemplated by the statute of frauds, is a possession ostensibly by the debtor, or for his use—such as, being a badge of ownership, might give a delusive credit. And, though the possession of a wife living separate from her husband, of her own or of his property, may be deemed his possession,—property lent or entrusted to her, by a friend or stranger, is not in his possession, within the statute, or for any purpose. *Chiles v. Bernard's ex'rs*, 3 Dana, 97.
3. (*How far evidence of slavery.*) A person may be held in slavery for thirty years, and neither that, nor any other, length of possession, will be evidence that he is rightfully so held; and will be, at best, but a slight circumstance, in aid of other proof of a condition of slavery. *Gentry v. McMinnis*, 3 Dana, 384.

PRESUMPTION.

(*Of grant.*) A grant will be presumed of a part of a public square or street, from the lapse of time; so as to bar an indictment for a nuisance. *Commonwealth v. Alburger*, 1 Whar-ton, 469.

PRINCIPAL AND AGENT.

1. (*Duty of latter.*) A factor is bound to keep his principal informed of all material occurrences in the agency. *Brown v. Arrott*, 1 Miles, 137.
2. (*Same.*) Where the conduct of the agent is such as to justify the principal in concluding that there is nothing at risk, and to warrant him in carrying on his business, and in making his calculation for the government of his affairs upon the faith of the

safety of the matters under the agent's charge, the agent becomes an insurer to the principal for the whole amount. *Ib.*

PRIVILEGE.

1. (*Foreign consul.*) The privilege of a foreign consul is not personal, but it is the immunity of the country or government which the consul represents. It cannot be waived by a consul's omitting to plead it, or by his withholding the suggestion of it till after judgment. *Durand v. Halbach*, 1 Miles, 46.
2. (*Same.*) Nor can such privilege be destroyed by the consul's being joined as defendant with others not entitled to the same. *Ib.*

RECEIVING STOLEN GOODS.

(*Indictment for.*) Indictment for receiving stolen goods knowing them to be stolen. Held, that the time and place, when and where the goods were stolen, need not be stated in the indictment, nor proved at the trial. *Holford v. The State*, 2 Blackford, 103.

RECORDING.

(*Of mortgage after mortgagor's death.*) A creditor secured by a mortgage deed, executed by the debtor, in his life-time, but recorded after his death, is entitled to hold his security against all other creditors, who have acquired no specific lien on the property. *Haskell et al. v. Bissell et al.*, 11 Conn. 174.

RECOGNISANCE.

(*Variance.*) A party was recognised, in March, to appear "at the April criminal term." There was no such term, the next criminal term was in May. In June, there was a common law term, when he was called, and failed to appear. This was no forfeiture of the recognisance. *Thruston et al. v. The Commonwealth*, 3 Dana, 224.

REFERENCE.

(*Prospective agreement.*) A prospective agreement to refer all matters of dispute which may hereafter arise, will not oust the jurisdiction of the courts. *Randel v. The Chesapeake and Delaware Canal Company*, 1 Harrington, 234.

RELEASE.

(*When satisfaction.*) A release to one of two joint *tort feorsors*, is equivalent to a satisfaction, and enures to the benefit of both. *Brown v. Marsh*, 7 Vermont, 320.

RENT.

1. (*Ground.*) A ground-rent in Pennsylvania, *i. e.* a rent reserved to himself and his heirs by the grantor of lands in fee, is a rent-service, and not a rent-charge. *Ingersoll v. Sergeant*, 1 Wharton, 337.
2. (*Release or extinguishment.*) Mere lapse of time without demand of payment, is not sufficient to raise a presumption that a ground-rent created by a valid deed, has been released, or otherwise extinguished. *St. Mary's Church v. Miles*, 1 Wharton, 299.
3. (*Same.*) The lapse of twenty years without demand of payment, is evidence from which a jury may presume payment of the arrears of the ground-rent; but such presumption may be repelled by circumstances. *Ib.*

SALE.

1. (*Of goods out of possession.*) A valid sale may be made of personal goods, which are out of possession, and the sale will be of the thing itself, and not of a mere chose in action. *The Brig Sarah Ann*, 2 Sumner, 206.
2. (*Of chattels with lien.*) A sold a yoke of oxen to B for a stipulated price, to be paid at a future day, A to hold the oxen till paid for. A permitted them to pass into the possession of B, who sold them to C, and the latter to D, for good consideration and without notice of A's lien. Held, that the lien was not thereby defeated, but that A could maintain trover against D, for the conversion of the cattle; and that, without waiting the expiration of the term of credit. *Tibbets v. Towle et al.*, 3 Fairfield, 341.

SALE OF CHATTELS.

(*Misrepresentation or fraudulent concealment.*) Where a contract is entered into for the sale of a chattel, the price paid, and the article delivered to the purchaser, with the right to return it to the vendor within a stipulated time, provided the purchaser does

not in any way injure it whilst in his possession, and the property is returned to the vendor, who accepts it and repays the price—an action lies against the purchaser, if he has been guilty of a misrepresentation or fraudulent concealment in respect to an injury done to the property whilst in his possession. *Taylor v. Tillotson*, 16 Wendell, 494.

SET-OFF.

1. (*Assignment*.) Where there are mutual debts, which may be set off at law or in equity, the right of set-off is extinguished by a *bonâ fide* assignment of one of the debts. *Howe v. Sheppard*, 2 Sumner, 409.
1. (*Suit pending*.) A defendant cannot avail himself by way of set-off, of a debt against the plaintiff for which a suit is pending, on an appeal from arbitrators, by the party offering such set-off. *Good v. Good*, 5 Watts, 116.

SHERIFF'S SALE.

- (*Attorney*.) An attorney at law, conducting the sale of real estate upon an execution, cannot purchase the land for his own benefit to the prejudice of his client, for a less sum than the amount of the claim upon which it was being sold. And if there be two plaintiffs in the execution, he cannot purchase for the benefit of one, without the consent of the other, for a less sum than the whole amount of the claim. If he do so purchase, and the sheriff make a deed to one of the plaintiffs under such circumstances, there is a resulting trust for both. *Leisenring v. Black*, 5 Watts, 303.

SHIPPING.

1. (*Duty of master*.) A master of a ship, when present, is bound to interfere to prevent gross trespasses and misconduct of his officers towards the crew. If he is present when the officers commit an assault and battery, and he does not interfere, when he may, he is presumed to encourage and consent to it, and is jointly liable for the tort. *Thomas v. Lane*, 2 Sumner, 1.
2. (*Effect of capture of neutral ship on wages*.) The capture of a neutral ship does not, of itself, operate as a dissolution of the contract of mariners' wages; but at most only as a suspension of the contract. *Brown v. Lull*, 2 Sumner, 443.

3. (*Same.*) If the ship is restored, and performs her voyage, the contract is revived, and the mariner becomes entitled to his full wages for the whole voyage, if he has remained on board, and done his duty; or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. *Ib.*
4. (*Same.*) On a sentence of condemnation against the ship, the contract is dissolved, and the mariner is discharged from any further duty on board, and also loses his wages, unless there is a subsequent restitution of the property, or of its equivalent value, with an allowance of freight. *Ib.*
5. (*Same.*) In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor, and subject to their liens. *Ib.*
6. (*Same.*) If freight is decreed for the whole voyage, the mariner is entitled to full wages; if for only a part of the voyage, the mariner is entitled only to *pro rata* freight, unless under special circumstances, as where the mariner remained by the ship, at the special request of the master, to preserve and protect the property for the benefit of all concerned. *Ib.*
7. (*Incompetency of master.*) If a person, substituted as master, be grossly incompetent to the duties of his station, from want of skill, or bad habits, or profligate and cruel behavior, the seamen may be justified in refusing to do duty, or to remain by the ship. *United States v. Cassedy*, 2 Sumner, 582.

SLANDER.

1. The following words—"He snaked his mother out of doors by the hair of her head: it was the day before she died," are not actionable in themselves. *Billings v. Wing*, 7 Vermont, 439.
2. (*Description of magistrate.*) In slander, the charge was thus laid: "You have taken a false oath against me in a suit before 'squire H., and swore me out of some money, (thereby meaning in a suit against the said J. before P. H., esquire, he, the said plaintiff, had sworn falsely and committed perjury)". Held, that this was a sufficient averment of the magisterial character and jurisdiction of P. H. The court will take notice of the import of words in popular parlance. *Call v. Foresman*, 5 Watts, 331.

3. (*Mitigation of damages.*) Under the general issue, and without giving notice of special matter, the defendant may prove, in mitigation of damages, a state of circumstances inducing heat and passion, in order to show an absence of deliberate malice. But such proof must be confined to those circumstances only which form, in point of time and character, a part of one and the same transaction, on the happening of which the slanderous words are spoken. *Steever v. Beehler*, 1 Miles, 146.

SLAVES ABSCONDING.

1. (*Pursuit of.*) A citizen of another state, from whom his slave absconds into Pennsylvania, may pursue and take him without warrant, and use as much force as is necessary to carry him back to his residence. *Johanson v. Tompkins et al.*, 1 Baldwin, 577.
2. (*Arrest of.*) Such slave may be arrested on a Sunday, in the night time, and in the house of another, if no breach of the peace is committed. *Ib.*
3. (*Same.*) This right of the master results from his ownership and right to the custody and services of the slave by the common law, and the eleventh section of the abolition act of 1780, and other laws of Pennsylvania. It is the same right by which bail may arrest their principal in another state. *Ib.*
4. (*Same.*) The constitution and laws of the United States do not confer, but secure this right to reclaim fugitive slaves, against state legislation. *Ib.*
5. (*Taking of.*) It is no offence against the laws of Pennsylvania for a master to take his absconding slave to the state from which he absconded, the offence consists only in taking a free person by force under the act of 1820, or the act of 1788. *Ib.*
6. (*Same—opposition to.*) No person has a right to oppose the master in reclaiming his slave, or to demand proof of property. A judge or magistrate cannot order his arrest or detention, without oath, warrant, and probable cause. *Ib.*
7. (*Same.*) The master may use force in repelling such opposition, or the execution of such order, and the officer who gives such order, and all concerned in its execution, are trespassers. *Ib.*

SLAVES AND SLAVERY.

1. (*Right to select a purchaser.*) Where slaves have a right, under the will of their deceased owner, to select the person to whom the executor shall sell them—the person so selected, if willing to give a fair price for them, may maintain a bill to compel the executor to make the sale. But the chancellor will not, in such case, entertain the bill of a stranger, nor of one who will not give such a price as the executor ought to take. *Hopkins v. Morgan's executor*, 3 Dana, 19.
2. (*Blood.*) All persons of blood not less than one fourth African, are (in Virginia and Kentucky) *primâ facie*, deemed slaves; and, *e converso*, whites and those less than one fourth African, are, *primâ facie*, free. All negroes are deemed slaves; all whites and Indians free, when their color is the only evidence. *Gentry v. McMinnis*, 3 Dana, 385.
3. (*Color.*) A white person of unmixed blood cannot be a slave; but one apparently white, may have a taint of African blood, and be a slave; and evidence of such taint is admissible, even where a jury, upon their view, would decide, that the person was white; and instructions, that if, on inspection, they believe him white, they must find him free, would be erroneous. They must consider the whole evidence. *Ib.*
4. (*Admission.*) The fact, that a party held in bondage, and suing for freedom, had admitted that she was a slave, is entitled to very little weight. *Ib.*
5. (*Limitations.*) Where a person was born free, but is held in servitude, there is no statute of limitations that will bar his action to recover his freedom: the general act of limitation does not apply, because the trespass is continued till suit brought; the act of 1808 only applies where the party was once a slave, and became entitled to freedom by the statute of Pennsylvania referred to in that act. *Ib.*
6. (*Free mother.*) No one whose mother was free at his birth, can be a slave. All born of mothers in slavery in the state of Pennsylvania, since the year 1780, were born free, though subject to apprenticeship till twenty-eight years old; and their

right to entire freedom at twenty-eight, is not impaired by their being brought to Kentucky before they attain that age. *Ib.*

SLAVE TRADE.

(*Construction of statute.*) By the statute of the United States (1820, ch. 113, § 4), it is declared "that if any citizen, &c. shall, on any foreign shore, seize any negro or mulatto, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto on board of any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death." Held, that a person having no interest in or power over the negroes, so as to impress upon them the future character of slaves, and only employed in the transportation of them for hire from port to port, is not guilty under this act. *United States v. Battiste*, 2 Sumner, 240.

STATE COURTS, DECISIONS OF.

1. (*Construction of a law by a state court.*) The settled construction of a state law, by the highest court of the state, is considered by the federal courts as their rule of decision under the thirty-fourth section of the judiciary act, such construction being taken as a part of the law. *Thompson v. Phillips*, 1 Baldwin, 285.
2. (*Administration of state jurisprudence.*) The thirty-fourth section of the judiciary act will be liberally construed so as to administer the jurisprudence of the states as state courts do, both in the construction of statutes and constitution of the states, and on questions of local common law or usage. *Ib.*
3. (*Conflict with supreme court of the United States.*) When the supreme court of the United States have settled the construction of a state law relating to titles to land, they have adhered to it though the courts of the state have afterwards decided differently. *Ib.*

STATE LAWS, WHEN RULES OF DECISION.

1. (*Relating to process.*) State laws relating to process, practice, or the modes of proceeding before or after judgment, are not

within the thirty-fourth section of the judiciary act. *Thompson v. Phillips*, 1 Baldwin, 273.

2. (*Rule for judgment.*) But laws which prescribe a rule for the judgment to be rendered between the parties on questions of right, property, and title, whether adopted before or after the passage of the judiciary act of 1789, are within it. *Ib.*
3. (*Limitation.*) State laws limiting the time of bringing actions, recording deeds, docketing judgments and regulating their lien, are binding in the federal courts. *Ib.*
4. (*Same.*) They must decide on state laws of this description precisely as state courts do, unless the laws, treaties or constitution of the United States provide for the case. *Ib.*

STATUTES.

(*Of other states.*) The laws of other states are not judicially known to the courts in Kentucky; but are facts to be averred and proved like other facts. *Greenwade v. Greenwade*, 3 Dana, 497.

SUNDAY.

(*What time it includes.*) The "Sabbath," "the Lord's day," and "Sunday," mean the same day in all Christian communities, and include the twenty-four hours next ensuing the midnight of Saturday. *Kilgour v. Miles and Goldsmith*, 6 Gill and Johnson, 268.

SURETY.

1. (*Duties of co-sureties towards each other.*) Sureties are bound to observe good faith towards each other: and when funds are actually or potentially placed by the principal in the hands of one surety to be applied either to the payment of the debt or for the purpose of indemnifying him from any loss that may arise from the suretyship, he must be considered as holding them for the common benefit of himself and his co-sureties. *Agnew v. Bell*, 4 Watts, 31.
2. (*Indulgence to principal.*) A mere indulgence to a principal until he becomes insolvent and unable to pay the debt, will not release a security in the note which was the evidence of the debt, without omission by the plaintiff to proceed after notice. *Johnston v. Thompson*, 4 Watts, 446.
3. (*What, discharge of.*) The entry of a stay of execution on a

judgment against a principal debtor, without the knowledge and consent of a surety is a discharge of the surety ; or if done after the death of the surety, without the knowledge and consent of his executors, is a discharge of them. *State, use of Barber v. Hammond*, 6 Gill and Johnson, 157.

4. (*Same.*) A creditor by making a new agreement with his debtor, inconsistent with the terms of the original agreement, or any alteration in those terms, or in the mode or the time of performing them, without the assent of the surety of such debtor, thereby discharges the surety. *Sasscer v. Young and Kemp*, 6 Gill and Johnson, 243.
5. (*How to relieve himself.*) A security who has become chargeable by a forfeiture of a contract, or its non-performance by the principal, in the manner, and at the time agreed upon, may insure a prompt prosecution, either by discharging the obligation, or becoming by substitution entitled to all the remedies possessed by the creditor, or he may coerce the creditor to proceed by an application to a court of equity. *Ib.*

TENDER.

1. (*Effect.*) A tender and refusal of the property (or that which is equivalent) at the time and place fixed by the contract for its delivery, vests the property in the creditor ; and puts an end to his right to sue upon the contract. *Mitchell et al. v. Merrill*, 2 Blackford, 87.
2. (*Plea.*) The plea of tender, in such a case, need not state that the defendant was afterwards ready, or that he brings the property into court. *Ib.*

TRESPASS.

1. (*Title without possession.*) Title in the plaintiff to real estate, without possession, will not enable him to maintain trespass. *Wheeler v. Hotchkiss*, 10 Conn. 225.
2. (*Cattle trespassing.*) Injuries to cattle, though trespassing, are actionable. *Richardson v. Carr*, 1 Harrington, 142.
3. (*By mortgagor against mortgagee.*) Trespass will not lie by mortgagor against mortgagee, for taking possession of mortgaged chattels before the time of forfeiture, when the mortgage contains no stipulation that the property shall remain with

the mortgagor until forfeiture. *Jamieson v. Bruce*, 6 Gill and Johnson, 72.

4. (*Fishery*.) Trespass will lie by the owner of a fishery, for a direct interruption in the exercise of his right. *Hart v. Hill*, 1 Wharton, 124.

TREE.

(*Joint ownership*.) If a tree, the trunk of which stands on the land of A, extend some of its branches over, and some of its roots into, the land of B, A and B are not joint owners or tenants in common of such tree; but it is, with such overhanging branches and the fruit thereof, the sole property of A; and if B gather the fruit from such overhanging branches and appropriate it to his own use, he is liable in trespass to A. *Lyman v. Hale*, 11 Conn. 177.

TROVER.

(*Proof of demand unnecessary, where actual conversion*.) Where, in trover, actual conversion is proved, proof of a demand prior to bringing the action, is not necessary. *Jewett v. Partridge*, 3 Fairfield, 243.

TURNPIKE COMPANY.

(*Right of as to land*.) An incorporated turnpike company have the right to dig stone, clay and gravel, within the limits of the road, for its improvement and repair; and are not thereby subject to an action by the owner of the land. *Stokely v. Robbston Bridge*, 5 Watts, 546.

UNITED STATES, PRIORITY OF.

(*Construction of*.) Where a joint and several bond was given for duties at the custom-house, and afterwards a joint judgment was obtained against all the obligors (the principal and sureties), and then, one of the obligors (a surety) died; and the survivors became insolvent; held, that the United States were entitled to maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor, whose estate was also insolvent, in virtue of their general priority in cases of insolvency. *United States v. Cushman*, 2 Sumner, 426.

USURY.

1. (*Giving up of note infected by*.) Where the maker of a note

infected with usury, in consideration that the holder should cancel or discharge the same, promises to give a new note, deducting the usurious excess, such promise will be enforced in law. *McClure v. Williams*, 7 Vermont, 210.

2. (*Letting of cattle.*) The letting of sheep or cattle pursuant to the custom or usage of farmers is not usury, though the risk of the life of the animals be, by the contract, on the hirer, if such be the usage. *Whipple v. Powers*, 7 Vermont, 457.
3. (*By means of a fiction.*) If money be loaned and by fiction called sheep or cattle, or if there be any color or fiction to bring the loan within the proviso of the statute, it is usurious. *Ib.*
4. (*Same.*) The giving up a sheep or cattle contract, without the same being paid, and taking another therefor, fictitiously pretending to let cattle, where none in fact exist, is usurious. *Ib.*
5. (*Laws of other states.*) The laws of the several states relating to interest and usury, vary essentially; and whether a note payable in another state, upon a contract there made, is affected with usury or not, depends upon the local laws of that state—which are not judicially known to the courts in Kentucky; but are facts to be averred and proved like other facts; and without such proof, no court here can decide that such a contract is usurious. *Greenwade v. Greenwade*, 3 Dana, 497.
6. (*Surety.*) Usurious interest having been paid by a principal debtor, a surety, seeking to be relieved of the whole debt, on other grounds, is relieved from so much, as the excess above the lawful interest, applied as a payment when it was exacted, will extinguish. *Bartlow v. Boude*, 3 Dana, 595.
7. (*Recovery on.*) Where all usurious contracts are declared by law to be null and void, there can be no recovery either at law or in equity, in a suit instituted upon an instrument infected with usury, if the defence of usury be pleaded; the very instrument that is sought to be enforced being null and void. *Trumbo, executor of Neff v. Blizzard and Jacobs*, 6 Gill and Johnson, 18.
8. (*Foreclosure of mortgage.*) When a mortgage is given on an usurious consideration, the plea of usury either by the mortgagor or his alienee, is a full defence to a bill for a foreclosure by the mortgagee. *Ib.*

9. (*Relief against mortgage.*) But there is a recognised distinction between that and the case of a mortgagor who goes into chancery, seeking relief against the mortgage on the ground of usury, which will only be extended to him on his paying, or offering to pay, the principal and legal interest of the sum due, and this on the principle, that he who seeks equity, to obtain relief, must do equity. *Ib.*

VARIANCE.

- (*Words and figures.*) Debt on a writing obligatory for the payment of one hundred and twenty dollars. The declaration set forth the sum in words as above. The note, when produced on oyer, showed a promise to pay one hundred and twenty dollars, the sum being expressed in figures. Held, that the variance was immaterial. *Long v. Long*, 2 Blackford, 293.

VENDOR AND VENDEE.

- (*Parol agreement.*) When it is understood by the parties to a parol agreement that the latter is to be reduced to writing; and subsequently no act is done, money paid or expense incurred, but on attempting to reduce the agreement to writing, a difference arises as to its terms, an action will not lie for a breach of such agreement. *Whitehead v. Carr*, 5 Watts, 368.

VERDICT.

- (*Uncertainty of.*) The uncertainty of a verdict may be a good ground for setting it aside and granting a new trial, but it is no reason for arresting the judgment. *Tryon v. Carlin*, 5 Watts, 371.

WAGER.

1. (*Horse race.*) In a bet on a horse race neither party can recover without a decision of the judges. *Jacobs v. Walton*, 1 Harrington, 496.
2. (*Same.*) Before a decision either party may recover back his stakes. *Ib.*
3. (*Same.*) A special demand must be made of the stake-holder. *Ib.* 496.
4. (*Same.*) But where he paid over the stakes without a decision by the judges and against notice, held that a demand was unnecessary. *Ib.*

5. (*Same.*) *Quere.* Can a bet on a race in another state be recovered on? *Ib.*
6. (*Election.*) A bet on the nomination election of a candidate is void. *Porter v. Sawyer*, 1 Harrington, 517.

WARRANT.

- (*Officer's jurisdiction.*) Where an officer having a special and limited jurisdiction, issues a warrant to take the person or property of another, he must show, upon the face of his proceedings, that he has jurisdiction. *Hall v. Howe et al.*, 10 Conn. 514.

WILL.

1. (*Stock and grain of farm devised.*) A testator devised a farm, and bequeathed the stock thereon to his widow for life, for the use of herself and other members of his family, with remainder to others named in his will; after his death his widow took possession of the farm and stock, and used the same as directed by the will until her death: Held, that the stock and grain which remained at her death, although not the same which she received, went in remainder to the legatees named in the will, and not to the personal representative of the widow. *Flowers v. Franklin*, 5 Watts, 265.
2. (*Proof of execution.*) The legality of the execution of a will must be judged of by the law as it was when it was executed, and not as it was at the death of the testator. *Mullen v. McKelvey*, 5 Watts, 399.

Each of two witnesses to a will, in order to establish its execution must testify to all that the law requires, in order to justify the court in permitting it to go to the jury. *Ib.*

When one subscribing witness testifies positively to the execution of a will, and the other, that he remembers having subscribed a will as a witness at the request of the testator, and will not say positively whether his name as a witness to the will, is his signature or not, the court rightly permitted the will to be read to the jury. *Ib.*

WITNESS.

1. (*Plaintiff on the record.*) In an action on a promissory note, brought and prosecuted by the assignee, in the name of the

payee, against the maker, it was held, that the plaintiff on the record was a competent witness for the defendant. *Johnson v. Blackman*, 11 Conn. 342.

2. (*Competency of.*) When a party has so divested himself of interest that he cannot resume his title by compulsion of law, he is a competent witness. *Dellone v. Rehmer*, 4 Watts, 9.

A witness may testify though he believes himself interested; such belief, like an expectation of benefit, depending on the honor of him who has been put in possession of the title, furnishes an objection to his credibility, but not to his competency. *Ib.*

3. (*Cestui que trust.*) Upon the trial of an issue which affects a trust fund, the *cestui que trust* is not made a competent witness by an absolute assignment by the trustee to a third person, without sufficient consideration. *Hoak v. Hoak*, 5 Watts, 80.

One of several plaintiffs can be made a competent witness only by an assignment of all his interest, and an actual and unconditional payment of all the costs which have accrued, and a deposit of a sum of money, sufficient in the opinion of the court, to pay all the costs that shall subsequently accrue, to be appropriated to their payment in any event of the cause. *Ib.*

4. (*Husband and wife.*) A husband and wife having joined in a deed of conveyance of land which contained a covenant of general warranty, in an action of ejectment for the same land, where the question was whether that conveyance were not fraudulent under the statute of 13 Eliz., it was held that, the husband being dead, the wife was a competent witness, to repel the allegation of fraud. *Chambers v. Spencer*, 5 Watts, 404.

5. (*Competency of.*) A, the payee and indorser of a note made by B, for the accommodation of C, is a competent witness in an action by B, against A, who guaranteed the payment of the note by C, at maturity. *Robertson v. Stewart*, 5 Watts, 442.

The witness's anticipation that the amount to be recovered in such action will be applied to discharge his liability on the note, does not affect his competency. *Ib.*

6. (*Agent.*) Where A, an agent, whose principal B is unknown at the time of the transaction, deals with and makes a contract

of sale in his own name with C; in an action by C against B, on such contract, A is not a competent witness for the plaintiff to prove the agency and the contract, without a release from C. *Hickling v. Fitch*, 1 Miles, 208.

7. (*Interested.*) To the general rule, that interested witnesses are incompetent, there are exceptions. The true test is—"whether it would be more consistent with right and justice, that in a given class of cases, a person interested in the event of a suit, should, or should not, be allowed to testify in favor of his interest." An inhabitant of a city (*e. g.* Maysville) is not incompetent as a witness for the city—because of the community, remoteness and contingency of his interest. The case of a stockholder is different. *Maysville v. Shultz*, 3 Dana, 11.
8. (*Party.*) A party cannot in general be a witness for or against a co-party: but there are some exceptions to this rule at law, and more in chancery. A defendant in chancery may be a witness against a co-defendant, where he is necessarily a party, but will not be affected by the decree against his co-defendant, and does not swear in favor of his own interest. *Williams v. Beard*, &c., 3 Dana, 158.

II.—DIGEST OF ENGLISH CASES.

COMMON LAW.

Selections from 6 Nevile and Manning, Part 3; 1 Nevile and Perry, Part 3; 3 Bingham's New Cases, Part 4; 2 Meeson and Welsby, Part 3; and 7 Carrington and Payne, Part 3.

ARBITRATION.

- (*Finality of award.*) An award, that one of the parties to the submission shall put a house into repair to the satisfaction of A, a builder, who is a stranger to the reference, is bad. (Com. Dig. Arbitrament, E. 15). *Tomlin v. Mayor of Fordwich*, 6 N. & M. 593.

BILLS AND NOTES.

1. (*Notice of dishonor.*) "The note for £200 drawn by H. H., dated 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore request you will let me have the amount forthwith:" Held, not sufficient notice of dishonor. *Boulton v. Welsh*, 3 Bing. N. C. 687.

[The court of exchequer has since, in a case of *Hedger v. Stevenson*, expressed an opinion dissenting from the above.]

2. (*Same.*) A person sent by the holder of a dishonored bill of exchange, called at the drawer's house the day after it became due, and saw his wife, and told her that he had brought back the bill that had been dishonored. She said she knew nothing about it, but would tell her husband of it when he came home. The party then went away, not leaving any written notice: Held sufficient notice of dishonor. *Housego v. Cowne*, 2 M. & W. 348.

COINING.

- If two utterers of counterfeit coin, with a general community of purpose, go different ways, and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. *Rex v. Manners*, 7 C. & P. 801.

DEED.

- (*Property in.*) Where property in land passes by a deed, the property in the deed passes with it. And an attorney, who draws and attests a deed conveying land from A to B, is not permitted afterwards to say that the property in the land, or in the deed, did not pass. *Lord v. Wardle*, 3 Bing. N. C. 680.

EVIDENCE.

1. (*Of acts of ownership.*) Where, in trespass *qu. cl. fr.*, the plaintiff claimed the whole bed of a river flowing between his land and the defendant's, the defendant contending that each was entitled *ad medium filum aquæ*: Held, that evidence of acts of ownership exercised by the plaintiff upon the bed and banks of the river on the defendant's side, lower down the stream, and where it flowed between the plaintiff's land and a

farm of C, adjoining the defendant's land,—and also of repairs done by the plaintiff to a fence which divided C's farm from the river, and was in continuation of a fence dividing the defendant's land from the river,—was admissible for the plaintiff. (14 East, 352; 2 B. & Ald. 554; 2 Bing. N. C. 102.) *Jones v. Williams*, 2 M. & W. 326.

2. (*Correspondence*.) A defendant who puts in evidence a correspondence, consisting of several letters, between himself and the plaintiff, has a right to give in evidence a letter written by him to the plaintiff, in reply to the plaintiff's last letter, bearing date the previous day. *Roe v. Day*, 7 C. & P. 705.
3. (*Confession*.) There is a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable in evidence. *Rex v. Spencer*, 7 C. & P. 777.

LEGITIMACY.

On the trial of a question as to the legitimacy of a child procreated during marriage, neither the husband nor the wife is a competent witness to prove non-access. Nor can their evidence of facts from which non-access may be inferred, be received for that purpose. *Rex v. Inhabitants of Sourton*, 6 N. & M. 575.

LIMITATIONS, STATUTE OF.

On a note payable with interest on demand, the statute of limitations begins to run from the date of the note. (10 Mod. 38; Selw. N. P. 352, 8th ed.) *Norton v. Ellam*, 2 M. & W. 461.

MONEY HAD AND RECEIVED.

The plaintiff, a stockbroker, sold for the defendant four Guatemala bonds, and paid him the amount; the bonds, after they had been in the purchaser's hands two days, were discovered to be unmarketable; whereupon the plaintiff took them back, and reimbursed the purchaser: Held, that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant. (8 T. R. 610). *Young v. Cole*, 3 Bing. N. C. 724.

PATENT.

(*Disclaimer*—*Effect of 5 & 6 W. 4, c. 83, § 2*). Where a patent

was originally void, but has been amended under the 5 & 6 W. 4, c. 83, by filing a disclaimer of part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer. *Perry v. Skinner*, 2 M. & W. 471.

STOPPAGE IN TRANSITU.

A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them, without tendering back the bill.

TRESPASS.

1. (*Justification of removal of goods.*) If A wrongfully places goods in B's building, B may lawfully go upon A's close adjoining the building, for the purpose of depositing the goods there for A's use. (Vin. Abr. Trespass, pl. 17, (I. a.)). *Rea v. Sheward*, 2 M. & W. 424.
2. (*Evidence in mitigation of damages.*) In an action for false imprisonment, by giving the plaintiff in charge to a police officer, the defendant may, in mitigation of damages, go into evidence to show that the plaintiff had for several days been in the habit of going after him and annoying him. *Thomas v. Powell*, 7 C. & P. 807.

WILL.

(*Cancellation of.*) A mere intent to burn a will, even though the testator throw it on the fire, is not sufficient to constitute a cancellation. Some part of the body of the will must be actually burnt. (2 W. Bl. 1043; 3 B. & Ald. 489). *Doe d. Reed v. Harris*, 1 N. & P. 405.

WITNESS.

1. (*Commission for examination of.*) The court added to the usual terms of a commission for the examination of witnesses at Paris and Bologne, a liberty to the parties to cross-examine the witnesses *vivâ voce*, such cross examination and the answers to be reduced into writing, and returned with the commission. *Pole v. Rogers*, 3 Bing. N. C. 780.
2. (*Competency.*) A person who obtains goods on credit, not having the means or intention of paying for them, is a competent

witness in an action of trover by the seller, to recover possession of them from a person to whom the buyer parted with them at a less price than he had engaged to pay for them.

Triebner v. Loddy, 7 C. & P. 718.

WOUNDING.

The prisoner struck the prosecutor on the side of his hat with an air gun with great force, whereby the prosecutor was wounded ; but the weapon did not actually come in contact with the head : Held, a wounding within the 9 G. 4, c. 31, §§ 11, 12. *Rez v. Sheard*, 7 C. & P. 845.

III.—MISCELLANEOUS CASES.

In the District Court of the United States, for the District of Maine, December Term, 1834, and, by adjournment, January, 22, 1835.

HOPEFUL TOLER (CONSUL) v. JOHN WHITE.

The certificate of a consul under the seal of the consulate, that the master of a vessel did not deposit his register with the consul in conformity with the act of February 22, 1803, § 2, is competent evidence, and is *prima facie* proof of the fact of the arrival of the vessel and of the non-delivery of the register.

In a suit for the penalty under this law, the consul is but a nominal party to the suit, the penalty is recovered for the sole use of the United States, and they are the real party in interest.

The master of a vessel is not bound by the act of February 22, 1803, to deposit his ship's papers with the consul in a port at which he merely touches and does not enter at the custom house.

This action was brought by the United States, in the name of their consul, at Ponce, in Porto Rico, to recover a penalty of \$500, of the defendant, master of the brig *Cadmus*, of Kennebunkport, for not depositing his register with the said consul, on

his arrival at Ponce, agreeably to the requirement of the statute of February 22, 1803, § 2. In order to prove the case, on the part of the plaintiff, the government offered in evidence the certificate of the consul, under the seal of the consulate, stating the fact of the arrival and departure of the vessel, without the register's being deposited in his hands, as required by law. The admission of this certificate, as evidence, being objected to on the part of the defendant, the point was argued, January 8, 1835, by the district attorney, *John Anderson*, for the plaintiff, and by *George W. Pierce*, for the defendant; and, on the 22d the following opinion, as to the admissibility of the said certificate, was delivered by

WARE, District Judge. The admission of the consul's certificate as evidence is objected to in the first place because he is a party in the case. The general rule is that a person whose name appears as a party on the record cannot be heard as a witness to support his own cause. The reason is that he is directly interested in the event of the suit, either from having an immediate interest in the matter in controversy, and therefore obtaining a certain benefit or loss, as the decision may be either in his favor or against him, or from his liability to cost in the event of an adverse decision. This is the sole reason for his exclusion, and the rule by which he is excluded, extends no farther than the reason on which it is founded. When, therefore, he has no interest in the subject in controversy, and is not liable for costs, whatever may be the decision, he is like any other disinterested person a competent witness. On this distinction the members of charitable corporations have been held to be competent witnesses for the corporation, they not being personally interested in the suit nor liable for costs,¹ and for the same reason it was ruled by judge Washington, in *Willings* and another *v. Consequa*,² that a party who had assigned to his co-plaintiffs all his interest in the matter in controversy, and had been indemnified by them against costs by a deposit with the clerk, of a sum sufficient to cover the costs already

¹ *Wells v. the Governor of the Foundling Hospital*: *Peakes* N. P. C. 135.

² *1 Peters's Circuit Court Reports*, 307.

arisen and those which probably would arise, was a competent witness for his co-plaintiffs, though his name stood on the record as a party to the cause. The interest which a party has, says Mr. Justice Washington, in the event of the suit, both as to costs and the subject in dispute, is the reason why he cannot be a witness; and when that interest is removed the objection ceases.

In this case the suit is directed by the statute to be prosecuted in the name of the consul. But it is commenced by the order of the United States, it is prosecuted for their benefit and by their attorney, and the penalty when recovered is recovered for their use. The consul's name is used instead of that of the United States, the real plaintiff, as the postmaster-general stands on the record as the nominal plaintiff, in all suits commenced for debts due to the post office. The consul has no interest in the subject in controversy, and no control over the action. He is a mere nominal plaintiff and is not, as I understand the law, liable for costs, in the event that the decision is against him. The objection to the admissibility of the certificate on the ground that the consul is a party on the record cannot be sustained. It is further objected that the evidence is taken *ex parte*. The answer to this objection is that it is taken by neither party in the proper sense of the word, unless the consul should be considered in this act as the representative of the United States. The evidence comes from a public officer in the regular discharge of the proper functions of his office, and as a part of his regular and ordinary official duty. It cannot therefore with propriety be termed *ex parte* evidence.

Another objection is that it is not under oath. It is true that the certificate is not confirmed by the oath of the consul. But it cannot be considered as wholly unprovided with the sanction of an oath. In giving the certificate he acts as a public officer within the proper sphere of his official duty, and though the attestation of his oath is not given directly to the certificate, it is made under the obligation of his oath of office. There are many cases in which the certificate of a public officer, acting within the range of his official duty, is received as evidence without being verified by the oath of the officer. Indeed they are not thus usually verified. But this is not admitting evidence unsupported by oath.

The official oath of the officer applies to the certificate, and is binding on the officer in giving it, as far as an oath can bind.

The violation of truth is not in such cases, indeed, usually visited with the penalties of perjury, but is punished as an official misdemeanor. But it is not on that account the less perjury in the forum of conscience. The return of an officer on a precept of court is received as evidence, but it is not sworn to. A copy of a record, certified under the official seal of the recording officer, is not verified by any other oath than his oath of office. Yet this is admitted in evidence and is of higher authority than an examined copy which is sworn to by any other person.¹

But though these objections are not conclusive against the admissibility of the certificate, the question still recurs, is it competent evidence. As it does not present itself in a form, which entitles it to be received according to the ordinary rules of courts of law, it belongs to him who offers it to shew, that it is within some principle, that takes it out of the ordinary rule, by which papers of this kind are excluded from the character of evidence. No decision directly in point has been referred to in the argument. I have met with none in my own researches. Yet it can hardly be doubted that this precise question must have occurred in the practice of the courts. In deciding the question, then, we must recur to general principles.

A consul holds a high and responsible office. The original object of the institution of the office was purely commercial, it being the consul's duty to watch over and protect the commercial rights of his country, within the limits of his consulate.

This is a general duty, which it is believed results from the nature of his office. But there are some particular duties, which are specifically required of him by the laws of this country, and one of them is that mentioned in the section of the law on which this action is founded, viz., that of receiving the papers of all American vessels arriving at the port where he resides. The receiving of the register of a vessel is an official act done in

¹ Buller's *Nisi Prius*, 226.

discharging the ordinary functions of his office. He is therefore the proper person to be called upon to prove, whether it was deposited with him or not; and if it was not, he is the only person by whom this fact can be proved. It would seem, therefore, that he must be a competent witness, from the necessity of the case, and the only question, which can be raised, is, whether his testimony must be under oath. I think it is not necessary; but that the authentication of the certificate, by the seal of the consulate, is equivalent to a verification of it by the oath of the party. It is not contended, that the annexation of the seal of the consulate to every certificate will make it evidence. It is only when he certifies a fact, which falls within his official cognisance, in the regular discharge of the duties of his office. Why should not his certificate, authenticated under the seal of the consulate, have the same credit as the certificate of the clerk under the seal of the court. In the case of *Church v. Hubbard*,¹ the certificate of the American consul at Lisbon was offered to prove a law of Portugal. It was annexed to a copy of a translation of the law certifying that the copy was a true one and that the translation was correct. It was adjudged to be inadmissible as evidence. The chief justice, in delivering the opinion of the court, observed, that to give this certificate the force of testimony, it would be necessary to show, that it was one of the consular functions, to which the laws of this country attach credit. The certificate in that case was an extra-official act. The American consuls have not the custody of foreign laws, and can give no copies of them. But in the present case, it is made the duty of the master to deposit his register with the consul, and the consul receives it in his official character. It is a matter, which falls within his official cognizance, and, in making a certificate of the fact, he is performing one of the regular and ordinary functions of his office. My opinion on the whole is, that the certificate is evidence of the fact which it certifies.

A question still remains, is it evidence of any thing more than

¹ 2 Cranch's Reports, 187.

the naked fact of the non-delivery of the register. It appears to me that it must be allowed the effect of *prima facie* evidence of the arrival of the vessel. This is indeed a fact which may be proved by other witnesses; but it is the consul's duty to see that our laws are observed by masters of vessels visiting the port where he resides. The fact of the arrival, connected with the non-delivery of the register, seems properly proved by the consular certificate.

The certificate of the consul having been admitted to be read as evidence, it appeared therefrom, that captain White arrived at Ponce, in Porto Rico, in the brig Cadmus, the first of March, 1834, between the hours of six and seven o'clock in the morning, and came to anchor; that he went on shore in the course of the day and passed by the consul's office, and that the vessel remained in port until about five o'clock in the afternoon of the same day, when she got under weigh and left, without having deposited her papers with the consul.

A number of ship-masters were examined to show what had been the practice of masters, as to depositing their papers with the consul. The evidence related principally, but not exclusively, to the usage in the ports of the West Indies. It appeared, that, for many years after the passage of the act, it was not the custom of masters to deposit their papers with the consul, except at the ports where they came to an entry and transacted business, and not always in those cases; but that the usage was general, not to deposit their papers with the consul, at a port where they merely touched to try the market, or for information, although they might be required to pay some small port charges, as anchorage, &c.; but that within a few years, the consuls in some of the West India ports had required the deposits of the ship's papers, in all cases where the vessel came into port, whether she came to an entry and transacted any business or not; that the demand of the consuls had in some instances been complied with, but had more generally been resisted. It was also proved that it was a common practice in this trade for vessels to touch at one or more markets for the purpose of ascertaining the state of the market, or to

learn at what place they could dispose of their cargo most advantageously.

The case was then argued by the gentlemen above-mentioned, and was submitted to the decision of the court, on the law and evidence, the right being reserved to each party, to sue out a writ of error, as on a judgment rendered on a verdict.

The following opinion was subsequently delivered by WARE, District Judge.

This is a suit for a penalty brought on the act of February 22, 1803, supplementary to the act of April 14, 1793, concerning consuls and vice-consuls. The 2d section of the act provides, that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, who shall sail from any port of the United States after May next, on his arrival at a foreign port, to deposit his register, sea letter and Mediterranean passport, with the consul, vice-consul, commercial agent, or vice-commercial agent, if any there be at such port, and that in case of refusal or neglect of the said master or commander to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction.

It is contended, by the counsel for the plaintiff, that by the true construction of the act, the master is bound in all cases to deliver the papers of his ship to the consul whenever he goes into port and comes to anchor, whether he makes an entry at the custom-house and transacts any business in the port or not, and whether he remains there a longer or shorter time; that the words of the statute being general and without qualification, that the master shall on his arrival deposit his papers, the court cannot interpose an exception which is not found in the law. On the part of the defendant it is contended that the master is never bound to deposit his papers except at a port where he comes to an entry at the custom-house, and that such has been the general understanding with respect to the law among masters of vessels and mercantile men.

The evidence which has been offered, to show what has been the usage under the law, may be disposed of by one or two general observations. It cannot be pretended that usage alone can abrogate a positive act of the legislature. Customary law or that which rests on no other foundation than usage, may be abrogated by a contrary usage. As it derives its whole authority from the silent assent of those who are affected by it, its obligatory force may be annulled in the same way by the silent adoption of a contrary usage. But an act of the legislature can be annulled only by the same authority by which it was made. If it was then shown by satisfactory evidence that the law had not been observed, this would not prove that it is not in force, and obligatory in those cases to which it applies.¹

But the practice under the law has been urged in another view, as showing the sense in which it was understood at the time, and immediately after it was made, by those to whom it applies and who had an agency in carrying it into execution, and as having something like the force of a contemporaneous construction of the act. It may be admitted that usage may in some cases throw light on the meaning of a statute, when its language is ambiguous and may fairly admit of two constructions. But usage, to be urged with effect for this purpose, must be consistent with the words of the act, although they may be susceptible of a different meaning. To admit that it can authorize a construction against the plain and evident meaning of the words is to admit that usage can repeal a statute. The custom must also be general and uniform. Now the evidence in this case relates almost entirely to a particular trade, the trade in the ports of the West Indies; and a part of the evidence proves too much, for it shows that a practice has prevailed to some extent directly in conflict with the words of the law, not to deposit the ship's papers with the consul at all, even in the port where she has discharged her cargo and taken in a new one. The evidence does not prove such a general and uniform usage as can safely be relied upon as an index even

¹ 1 Mason's Reports, 504; *United States v. Lyman*.

to the opinions of mercantile men, as to the meaning of the law; much less such an usage as a court can receive as having the authority of a contemporaneous exposition of the statute.

We must then return to the statute itself and expound it by its own words, and by other acts of the legislature relating to the same general subject. The difficulty lies in determining the precise import of the word *arrival*, as it is used in this section. The common and obvious meaning of the word, is coming to some port or place. But in the fiscal and navigation laws of the United States, it is not always, perhaps not most generally, used in its original and etymological meaning, nor is it invariably used in one and the same sense, so that what is deemed by law to be an arrival for one purpose is not deemed to be so for another.

In the 25th, and some of the following sections of the collection law, act of 1790, c. 128, the word is used in its common and most comprehensive signification. Every master of a vessel coming from a foreign port is directed, on his arrival within four leagues of the coast,—or within the limits of any collection district, to exhibit the manifest of his cargo to the first officer of the customs who comes on board his vessel. The sense in which the word is used here, is that of coming within four leagues of the coast, or within the limits of a district.

The third section of the coasting act, February 12, 1793, authorizes vessels in certain cases, when in a district to which they do not belong, to change their papers and take out a temporary register or license, which they are required within ten days after their arrival within the district to which they belong, to surrender and take out new papers. In the case of the *United States v. Shackford*,¹ which arose in this district, it was decided that the penalty under this section was not incurred by a vessel touching at a port in her home district, coming to anchor and landing passengers in the course of a voyage to another port; but that to constitute an arrival, within the meaning of this section, it must be an arrival in the regular course of her employment, at a port of destination

¹ 5 Mason's Reports, 445.

within her home district. The casual touching at such port, for purposes not connected with the objects of the voyage, was not such an arrival as was contemplated by this section of the act. The word is evidently used in the same restricted sense in the 14th section of the registry act.¹

In both these sections nearly the same form of expression is used, as in the 25th section of the collection act, in which it is quite clear that merely coming within four leagues of the coast, or within the limits of a district, is an arrival within the meaning of the legislature; and in the other acts referred to, it is clear that a mere coming within the district is not such an arrival as is contemplated, and as makes it necessary for a vessel to change her papers. By the 15th and 17th sections of the coasting act, the master of a vessel arriving at a district, from another district, is required in certain cases to deliver a manifest of his cargo to the collector. The context clearly shows, that arrival, in these sections, means an arrival at a port of destination, where the cargo, or a part of it, is intended to be delivered. The 22d section of this act relates to vessels "putting into a port other than that to which they are bound," which, in the subsequent part of the section is called an arrival. Here the word is used for the touching at a port for purposes disconnected with the principal objects of the voyage.

It being then clear that the word is used in the revenue and navigation laws of the country in different senses; for merely coming to a place or port—for putting into or touching at a port, not for the purposes of trade, but from necessity or any other cause, as well as for an arrival at a port of destination; whether in a given case the legislature intended one or another of these meanings, must be determined from the connection in which it is used, and the objects intended to be effected by the law. One of the objects of this requirement, as stated by the district attorney, is to prevent the use of simulated American papers, by vessels which are not entitled to them; and he referred to a communication of

¹ Act of December 31, 1792.

the executive to congress in 1797, urging the subject upon the attention of congress in this view. In time of war, the temptation to the merchants of the belligerents is very strong to screen their vessels from capture, by giving them a neutral character; and it is known as an historical fact, that during the late European wars, the practice of fabricating American papers for vessels belonging to the belligerents, was carried to a very great extent. The consequences were extremely embarrassing and vexatious to our commerce. The American flag became every where suspected of covering enemies' property; and our own vessels in consequence of this suspicion, were subjected to great embarrassments, and our merchants to heavy losses. The interests of our commerce were at that time deeply concerned in suppressing this abuse. And in peace, as well as in war, both the honor and interest of the country require that the rights of our flag should not be usurped by those who are not entitled to them. When nations have granted to our commerce particular privileges by treaty, good faith, as well as the public interest, demands of our government to prevent others from fraudulently obtaining the same privileges, by the use of simulated American papers. These frauds may be checked to a very great extent, or made very hazardous to those who perpetrate them, by requiring masters of vessels in all cases, on arriving in a foreign port, to deposit their papers with a public officer, who may be provided with the means of distinguishing the genuine from spurious and forged papers or documents. But besides motives of this kind, the government have an interest in knowing whether our vessels habitually carry with them when abroad the proper documentary proof of their American character.

The mercantile classes of the community have a deeper interest than any other, in having this law so enforced as to attain rather than frustrate the objects intended to be effected by it;—and, on the other hand, it cannot be supposed that the legislature intended such a construction as should produce unnecessary embarrassments to trade. The provisions of the law were doubtless intended as a benefit and security, and not as a burthen to the commerce of the country. Now the evidence in this case shows that

it is common for vessels to clear out for a particular port or island and a market, and if the evidence, which was objected to by the counsel for the plaintiff, is not properly admissible, I know not but the court may judicially take notice of a fact of so frequent occurrence and so well known. In those cases they often touch at one or more ports for information, before they find a market that suits them, and usually they only stop long enough for the master to go on shore and call on a merchant;—sometimes the vessel goes into port and comes to anchor, and sometimes she lies off and on without coming into port; in some cases there are small port charges to be paid, and in some cases there are none. The object of the master is to obtain information with the least delay practicable, and if the market does not suit him to proceed to another port. To require him in those cases to part with his vessel's papers might be attended with serious inconvenience. Besides the increased delay it would occasion, and every delay in maritime commerce is to be regarded as a source of increased danger, his vessel, while lying off a port, might by a sudden change of wind, be driven to sea without papers. A construction of the law which would produce such inconvenience ought not to be adopted, unless such appears evidently to have been the intention of the legislature. The district attorney makes here a distinction, and holds that a master is not required to part with his papers unless his vessel come to anchor. But the words of the law make no such distinction, and if we adopt the strict meaning of the word in this section, the coming to anchor is no part of the arrival. That is complete before her anchor is cast.

It does not appear to me, that the policy of the law requires this construction, and it seems that all the objects intended to be attained by it, may be had by an interpretation less onerous to commerce. And I think the words of the law, also point to a different construction. The term deposit, carries with it the idea of something more than the mere delivery of the papers to the consul for inspection, to be re-delivered in a few hours. This word is not usually employed, except when the thing is intended to remain with the depositary for some time, and when the deposit is made for some specific object, beyond that of mere in-

spection or examination. The subsequent words of the statute go to confirm the idea, that this term is here used in its common and most usual sense. After directing the master to deposit his ship's papers with the consul, the law proceeds to direct the consul in whose custody they are deposited, on "the master's producing a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to said master all his said papers." The natural inference from this language is, that the legislature intended that the ship's papers should remain in the custody of the consul, while the ship remained in port. And it may be inferred with a yet higher degree of probability, that the cases which were in the contemplation of the legislature, as falling within the provisions of the law, were those of vessels coming to an entry at the custom-house, and engaging in trade, where they would necessarily be detained a considerable time. For when a vessel merely touches at a port for a few hours, and engages in no trade, she does not ordinarily make an entry at the custom house, and of course does not take a clearance. If the cases of vessels merely touching at a port for information, without engaging in trade, had been within the contemplation of the legislature, as comprehended within the requirements of this section, they would not have directed the consul to redeliver the ship's papers to the master, on his producing a clearance, but to deliver them whenever the vessel was ready to depart; at least that or some other equivalent expression would have been much more natural, and more consistent with such an intention, than that actually used. The inference is therefore strong, from the language of the law, that such a case as the present does not come within its meaning, and of course that the master has not incurred the penalty. On the whole, whether we look to the policy and objects of the law, or to its words, we are, I think, brought to the same conclusion, that when a vessel merely touches at a port without making an entry at the custom-house, or transacting any business, and stops but a few hours, the master is not bound to deposit his ship's papers with the consul. The natural inference from the language of the act is, that the deposit is only required when an entry is made, and that the word arrival, in this section of the law, means

an arrival at a port of destination; but there may perhaps be other cases to which this act will apply. It will, however, be in season to decide those cases when they are presented.

According to the agreement of the parties, judgment must be rendered for the defendant.

[A writ of error was afterwards brought to the circuit court, on the foregoing decision, and was dismissed. The several questions, discussed in this case, are also examined in the cases of *Levy v. Burley and Parsons v. Hunter*, (2 Sumner's Reports, 355 and 419); in which Mr. Justice STORY dissents, in some points, from the opinion above expressed by Judge WARE.]

In the District Court of the United States, for the District of Rhode-Island, August Term, 1837.

CALEB WILLIAMS, JR. AND OTHERS *v.* THE CARGO, TACKLE, AND APPAREL OF THE SHIP ADOLPHE.

Property found in a vessel, abandoned in a harbor on an uninhabited coast, comes within the maritime definitions of derelict property, unless it appears that there was an intention to return to the vessel, on the part of the officers and crew.

When a part of the cargo of a vessel is thrown overboard to make room for property found abandoned, the owners of such part of the cargo are not entitled to be first reimbursed out of the proceeds of the substituted property, but as between the salvors, in adjusting their proportions, their claim should be duly considered, and should be taken into the general account of the merits and sacrifices of the salvors.

In this case, the following opinion, embracing all the material facts, was delivered by

PITMAN, District Judge. This is a cause of salvage originally instituted by the master and owners of the bark *Triton* for themselves alone. Afterwards their libel was so amended by consent as to include the crew of the *Triton*, excepting Ephraim Hansen, Duncan McClellan and Joseph M. Smith. A petition and claim for salvage was at the same time filed by the said Hansen, McClellan and Smith, which was resisted by the master and owners, on grounds stated in their answer; but at the

hearing, the answer to this petition was abandoned and the libel agreed to be amended so as to include all the crew of the *Triton*, as libellants. I have been thus relieved from the consideration of any material question of controversy as between the salvors.

A claim has been interposed by the consul-general of France residing at New York, in behalf of the original owners of the ship *Adolphe* and cargo, being French subjects, praying for restitution after awarding to the libellants competent salvage.

The material facts stated in the libel, and supported by the proof, are : The *Triton* on a voyage from New York to the Pacific Ocean and the north-west coast of America, on the 18th of February last, and between the 47th and 48th degrees of south latitude, encountered a severe gale of wind and shipped a sea, which caused so much damage that the projected voyage was abandoned, and she put away for the harbor of St. Elena, on the east coast of Patagonia, to repair. On the 22d February she reached the harbor of St. Elena, and found there stranded the French ship *Adolphe*, of Nantz. At low water she was high and dry upon the rocks. She appeared to be a French whale ship, with some cargo on board, being part of her outfit, and abandoned by her officers and crew ; she had a large hole in her bottom, so that the tide flowed in and out of her ; her rudder was carried away, her keel sprung on one side, a considerable proportion of the copper washed off, and she was hogged or broken-backed. She was in a condition which rendered it apparently impossible to get her off from the rocks, and if so, to make her fit for sea.

After surveying the wreck, the master, and Hunt, the supercargo and part owner of the *Triton*, thought it best to attempt saving the cargo of the *Adolphe*, her tackle and apparel ; and to make room on board the *Triton* for the same, they deemed it necessary and did throw overboard a part of the *Triton's* cargo, which they thought less valuable than what they expected to save from the *Adolphe*.

The *Triton* lay in the harbor of St. Elena from the 22d of said February until the 18th of March last, her crew employed in saving the cargo and apparel of the *Adolphe*, and in repairing the damages sustained by the *Triton*. The latter was the work of

two or three days by such of the crew as were employed therein, the residue being employed in the salvage services. Having got out all the cargo which they could, the *Adolphe* was set on fire by the orders of the master of the *Triton*, to get the copper and copper bolts which could not be procured without. In about two days, after the ship was partly burned, a gale came on, accompanied with a higher tide than they had before experienced, which, in the opinion of some of the witnesses, would have washed away the *Adolphe* and what remained in her, if she had not been set on fire, and which actually washed away what was remaining, and removed many articles of great weight, which had been deposited on the shore, supposed to be in a place of safety.

The libellants claim salvage on property *derelict*, and the owners of the cargo of the *Triton* (being the same as the owners of the ship), claim to be remunerated for that portion which was thrown overboard, aside from their other claims as salvors.

It is contended in behalf of the owners of the salved property that this is not a case of *derelict*—that the officers and crew of the *Adolphe* abandoned her with the intention of returning (as is to be presumed) when they had obtained the means so as to be able to save the cargo, and that the service rendered by the salvors merits not the high reward usually given in cases of *derelict*. And whether a case of *derelict* or not, it is contended that the claim for remuneration for the cargo thrown overboard is wholly unprecedented in relation to the owners of the salved property, however it may be considered in adjusting the proportions of salvage among the respective salvors.

Whether this be a case of *derelict* or not may not be very material, except as bringing the case within a rule which has been adopted in the admiralty courts in this country, as a guide to judicial discretion. Apart from this rule the meritorious nature of the services rendered, and the small amount of property saved, might induce the court to decree an amount of salvage, as great as if guided by the rule in cases of *derelict*.

If the property is found abandoned by the officers and crew, it comes within the maritime definition of *derelict*, unless it appears there was an intention to return to the vessel. Was there any

evidence of such an intention in this case? Those presumptions which may arise in cases of ships found on shore or stranded in a civilized and inhabited country do not exist in this case. The Adolphe was found on an uninhabited coast, and as far as she might be visited on the land side, it was by savages. The circumstances in which the Adolphe was found furnished no presumption that the crew intended to return. On board, the hatches were gone—the companion-way open—on shore they found chests and tents, but the provisions and clothes strewed about the tents, and no appearances of any care to preserve the property, until they might return to take it, either on board or on shore. I deem it unnecessary to pursue these remarks, as those who set up the intention of returning in cases of abandonment, *prima facie*, are bound to give some evidence of this intention. A paper found on board the Adolphe, signed by Hyppolitus Leopold Saxemæder, harpooner on board the Adolphe, dated February 8, 1837, is relied on to show the intention of returning. He was the owner of a chest found on board, and this paper appears to have been written for the purpose of preserving his claim for the space of *three years*. In this paper he says (speaking of the chest), "*it is not abandoned*. We pray those who shall find it to respect it for the space of *three years*, &c." A paper signed by a person of so little consequence on board would not be entitled to much consideration, as evidence of the intention of the master to return to the vessel. But it proves too much, if any thing, an intention not to abandon under *three years*. It will hardly be contended that the Adolphe and cargo were not to be deemed derelict until after that time. If the owner of this chest deemed it necessary in order to preserve his property to leave this paper, why did not the master of the Adolphe leave some writing, which might show what was his intention in leaving her, and giving some directions to those who might take possession of the property? There was a paper found in a bottle at the head of the grave of one of the crew of the Adolphe, drowned during the shipwreck. This paper gave an account of the disaster and the name of the deceased, and was formally signed by officers and crew; but nothing was in it which told of any intention of returning, nor whither the master and crew had gone.

I consider, therefore, the claim of the libellants in this case to be for salvage on property *derelict*.

The question occurs what proportion of the property saved ought to be awarded to the salvors?

Here it is necessary to consider a preliminary question which has been made by the claimant, as tending to diminish the amount of salvage or as forfeiting all right to the same. It has been said the firing the *Adolphe* was a wanton destruction of property, that a portion of her cargo was thus destroyed, and if the master and crew of the *Adolphe* had returned, they were thereby prevented from saving that part of the cargo which the *Triton* did not take; and that such an act deserves the severe rebuke of a court of admiralty, whose duty it is to guard against the destruction of property.

I have looked into the evidence in this case with much attention to see if there was any foundation for these suggestions—feeling it my duty to visit a wanton destruction of property, where there was any hope of recovery, with such a diminution or forfeiture of salvage, in relation to the guilty, as private rights and public justice might require. I see nothing in the evidence, however, which warrants these imputations upon the salvors or any of them. On the contrary they appear to have acted in a manner which would have been approved by the owners of the *Adolphe*, had they been present. The sacrifice of the less to the greater was the part of prudence and propriety. The object of the salvors was to obtain all they could from the wreck, and in so doing they acted for the benefit of the owners as well as themselves. It has been suggested that the hogsheads on board the *Adolphe*, when found, might have contained whale oil. There is nothing in the evidence to lead to such a presumption—there were no appearances that the *Adolphe* had taken any whales; if there had been oil on board when the ship was on fire, it would have been manifested in all probability by the raging of the flames, but no one then entertained such a suspicion. The master of the *Triton* says they found no oil on board except olive oil in bottles. Beverly, one of the crew of the *Triton*, says, “we got all out of the *Adolphe* but the ground tier of hogsheads which were full of salt water.” Hart, another

of the crew, says, "we left in the lower tier of hogsheads in the wreck, the water flowed in so that we did not dare to work there, and the wreck was falling to pieces every day we lay there." Hunt, the supercargo, says they saved every thing they could save. Smith, the mate, whose testimony was taken and introduced by the claimant, says, "after we got out most of the oil casks the captain and Hunt concluded to burn her." He says, "two thirds of the second tier in the lower hold of the *Adolphe* was broken up." He says indeed, "we left the oil casks on board, because the captain and Mr. Hunt were afraid of a noise or a mutiny on board the ship, and thinking the *copper was worth more than the casks.*" The testimony of the sailing-master, Hansen, introduced also by the claimant, is, that they "saved all the cargo they could; that they left some oil-casks, some were full of salt water, some empty, and some bilged in the lower hold; that the lower deck beams broke down and rested on some of these casks, so that they could not get them out without staving them, that they had to stave a number of bread casks to get the bread on this account, and that in his opinion and that of the crew, the captain and Mr. Hunt, it was best to set the vessel on fire; that there was no appearance of any whales having been taken by the *Adolphe* from any thing on board, and that he considered the wreck after some of the goods were got out, in a very dangerous situation on account of the heavy blows." No evidence in contradiction of this is in the cause. That more copper was not procured by the burning of the ship was not the fault of the salvors; she was set on fire on the 10th of March, according to the testimony of captain Williams, and the *Triton* remained at St. Elena, until the 18th of the same month. The master says, "we got a small proportion of the copper by setting the wreck on fire, and should probably have got the major part of it had it not been for the gale on the 11th and 12th, which swept it into the sea."

I come now to the consideration of the question, whether the owners of the *Triton* and cargo are to be paid specifically for that part of the cargo of the *Triton*, which was thrown overboard to make room for the property saved from the *Adolphe*.

In the case of *Small and others v. goods saved from the schooner Messenger* (2 Peters's Ad. Rep. 284), the cargo of the brig which saved the goods was *displaced* to receive them. There was in this case no claim to salvage by the owners of the cargo thus *displaced*. They probably held the master and owners of the brig liable to them, but nothing is said by the court, giving to the owners of the brig any further claim on this account, and Judge Peters seemed to be relieved from all difficulty in this respect, as there was no claim on this account by the owners of the cargo.

In the case of the brigantine *Harmony* and cargo, decided in the New York district court (reported in 1 Peters, 34, note), the salving ship threw overboard her cargo, stated in the libel of the value of five thousand dollars, to make room for the cargo saved. The amount of property saved was large, and a moiety of the net amount, after paying all expenses and costs, was decreed to the salvors, one third part of which was given to the owners of the salving ship, but no allowance was made *eo nomine*, for the cargo thrown overboard. In that case, the master and mate of the salving vessel were owners of the vessel, and received also an allowance as salvors, in their capacity of master and mate.

I do not find any case, in which the claim by the owners of the cargo thrown overboard, was set up, as in this case. As between the salvors, in adjusting their proportions it ought undoubtedly to be duly considered, and also to be taken into the general account of the merits and sacrifices of the salvors, but not as constituting by itself a distinct claim, entitled first of all to be paid.

In this case, the claim of the owners for a full indemnity for the cargo thrown overboard amounts, as they have stated their account, to the sum of three thousand two hundred and ten dollars and eighty-three cents. The proceeds of the property saved, deducting duties, amounts to five thousand eight hundred and thirty dollars and fifteen cents, and the claim on this account alone is more than is usually allowed salvors in cases of derelict. What then would remain for the owners of the *Adolphe*, and what for the other salvors? It would seem, indeed, from the statement at the hearing, as if the owners of the *Triton* could not be remunerated for the loss of the voyage they might have made after repairing damages at *St. Elena*, if

they had carried the salt which was thrown overboard to Monte Video, and brought home from thence a cargo of hides, as was contemplated at one time. Why was not this done? There was undoubtedly a mistake as to the value of the *Adolphe's* cargo, but the consequences of this mistake are not so to be visited on the owners of the *Adolphe*, as to leave them nothing of the property salvaged. The claim of the libellants is for salvage, the services rendered were salvage services, and the owners are to receive their property again, after paying salvage for the services rendered them. What service would it be to them to take their property under circumstances calling for the whole of it by way of indemnity. The mistake of the captain and supercargo, and part owner of the *Triton*, as to the value of the property on board the *Adolphe*, should not operate to the injury of the owners thereof; the salvors must bear the consequences of their own mistake, taking such a proportion only of the property salvaged, as by the law of the admiralty should be awarded them.

It has been urged for the claimant, for the purpose of diminishing the amount of salvage, that the *Triton* was enabled to make her repairs from the materials and tools found on board the *Adolphe*, and that without these the *Triton* could not have so repaired her damages as to have got home. If this were so, about which there is some contrariety of evidence, it was for the benefit of the owners of the *Adolphe*, that the *Triton* should have been repaired, otherwise their property could not have been saved by her means, and it does not lessen the merits of the salvage services, for which compensation is now to be decreed, because the salvage could not have been effected, but for the materials and aid furnished the salving ship from the wreck.

In the case of the *Ewbank* and cargo, the crew of the *Hope*, one of the salving vessels, when she fell in with the *Ewbank*, were suffering for want of provisions, and were greatly relieved by obtaining a supply from the *Ewbank*. This seems to have been urged in that case as diminishing the claims of those salvors who were on board the *Hope*. On this point Mr. Justice Story said: "nor do I think the distressed state of the *Hope*, at the time when she fell in with the *Ewbank*, can make any sub-

stantial difference in her merit, at least not in respect to her co-salvors. She might have supplied her necessities, and been excused and perhaps justified in so doing, from the abundance of the floating derelict ship, and then have left the latter to her fate. She did not stop there ; but having supplied herself, undertook the not less grateful though perilous task of saving the residue for others."

I now come to the principal question in this cause, the *merits of the salvage services*.

The time employed by the salvors in loading the cargo of the Adolphe on board the Triton, was a little more than three weeks. They worked for several nights as well as days. During this time the Triton was exposed to several gales, and almost every night to heavy squalls, and much labor was required on board the Triton to save her from sharing the fate of the Adolphe. "Almost every night," says the master, "we were obliged to let go an extra anchor, and from fifty to eighty fathoms of chain cable, on account of heavy tornadoes coming out of the south and west almost every night, suddenly without any previous notice." The mate, Smith, states, "we had frequently to let go two anchors almost every night, as the wind went around the compass almost every day, and blew so heavy at night, we were afraid of getting a round turn round our anchor." The frequent shifting of the winds rendered it necessary to heave up the extra anchors every day, to prevent the round turn mentioned by the mate. "Although the French ship lay in a very dangerous and rough place, and very much exposed to heavy seas that came into the harbor, it was" says the master "perfectly safe to land with our boats on the west side of reef point, under the protection or lee of the land, without danger of life, either on the rocks or on the beach."

The principal danger incurred during the salvage, was the exposure of the Triton to the same fate as the Adolphe, and it appears, from the fate of one of the crew of the Adolphe, that there was some danger of life in this exposure.

The cargo of the Adolphe was brought a long way hither: this was not necessary for the benefit of the owners of the Adolphe ;

it might have been saved, and in all probability placed in the hands of the master of the *Adolphe* by going into Buenos Ayres or Monte Video; the bringing it hither, therefore, though justifiable as the home of the saving ship, and if, as stated by Hunt, the supercargo, they thought this "the only place where they could dispose of the cargo from the wreck to any advantage," founds no extra claim for salvage on account of the length of the voyage hither.

The value of the *Triton* and her remaining cargo, at risk, whilst she lay in St. Elena, is not particularly proved. It was stated at the bar, that she was insured for six thousand dollars, and her cargo for ten thousand dollars, *on time*, so that here there was no deviation, but the premium was probably enhanced from the nature of the insurance.

The rule of salvage, in cases of derelict, ranges from a third to one half of the property saved, after deducting costs and expenses. Mr. Justice Story, in the case of *Rowe et al. v. Brig ———*,¹ after reviewing the law on this subject, comes to the conclusion, "that the general sense of the maritime world seems to be, that the rate of salvage, on derelicts, should not, in ordinary cases, range below a third, nor above a moiety of the value of the property, and that a moiety was the favorite proportion" of judicial tribunals. And in the same case he says, "that where a particular proportion has been frequently applied in a class of cases, slight or even considerable distinctions in the circumstances ought not to induce a court of law to depart from that proportion; that it was better to adhere to a rule which may operate somewhat unequally than to leave every thing afloat in mere undirected discretion." The rule, however, he considers sufficiently flexible to admit of exceptions "in cases of extraordinary peril and difficulty, and exalted virtue and patriotism, where a moiety of even a very valuable property might be too small a proportion, or in cases of so little difficulty and peril, as to entitle the parties to little more than a *quantum meruit* for work and labor." The same learned

¹ 1 Mason's Reports, 377.

judge had occasion to review this branch of the law in a subsequent case of the *Emulous*,¹ in which he says: "the court may say, and indeed it has said, that generally in cases of derelict, it will not allow more than one half the value as salvage. But extraordinary cases of great danger and gallantry may occur in which the court would even desert this rule." And in the same case he adds: "on the other hand, the value of the property saved must always form a very important ingredient, since that proportion would be a very inadequate compensation in cases of small value, which would be truly liberal in others of great value."

In a subsequent case, the *Ewbank*,² the same judge said: "the court on all occasions has great reluctance in deviating from a moiety, and expects a very strong case to be made out, in which, upon other principles, there would be a very great disproportion between the services and the compensation; so great indeed as in a moral and legal view to constrain the court to deviate from it." In this case he further said: "I agree that the value of the property saved constitutes a material ingredient in decreeing salvage."

In the case of the *Cora*, decided in the circuit court for the Pennsylvania district,³ Mr. Justice Washington remarked: "where the usual proportion of the property saved would afford a very inadequate reward to the owners of the property at risk or to the salvors, this might afford a good reason for increasing the proportion of salvage with a view to such compensation, but without at the same time losing sight of the owners of the property saved."

In the case of the *Adventure*, decided in the supreme court of the United States,⁴ Mr. Justice Washington, in delivering the opinion of the court, observed: "it being determined to be a case of salvage, the next question is as to the amount to be allowed. On this subject there is no precise rule; nor is it in its nature reducible to rule. For it must, in every case, depend upon pecu-

¹ 1 Sumner's Reports, 213.

² 2 Peters's Ad. Reports, 383.

³ 1 Sumner's Reports, 411.

⁴ 8 Cranch's Reports, 228.

liar circumstances, such as peril incurred, labor sustained, value decreed, &c., all of which must be estimated and weighed by the court that awards the salvage. As far as our inquiries extend, when a *proportion* of the thing saved, a half has been the *maximum*, and an eighth the *minimum*; below this it is usual to adjudge a compensation *in numero*. In some cases indeed more than a half may have been awarded; but they will be found to be cases of very extraordinary merit, or on articles of *very small amount*."

In the case of the *Jonge Bastiaan*,¹ reported as a case of derelict, Sir William Scott awarded for salvage, two thirds of the whole property, which had been appraised and delivered on bail at three thousand four hundred pounds sterling. The time employed by the salvors in that case, was somewhat more than the time which the salvors were employed in this case, looking only to the services at St. Elena, but not so much, if the voyage from St. Elena home be reckoned a part of the salvage services.

The services rendered in this case in the harbor of St. Elena were laborious, but not particularly perilous, except the dangers which threatened the *Triton* which have been stated, but which were guarded against by means of the cables and anchors of both vessels, though with much vigilance and labor. The services do not appear to me to be those of extraordinary peril and gallantry, sufficient to extract it from the general rule in cases of derelict, if the property saved had been of that value which would have afforded that liberal compensation, which it is the policy of the admiralty law to allow for salvage. I regret that it is not in my power to give this compensation to the salvors in this case, "without" (in the words of Mr. Justice Washington already quoted) "losing sight of the owners of the property saved." This I have no right to do. The salvors had no right to place the owners of this property in a predicament, which would subject them to the loss of all their property in expenses, costs, and salvage. Something should remain to the owners of the property saved, as well as something given to those who volunteered their services in saving

¹ 5 Robinson's Ad. Reports, 287.

it. The expenses attending the unloading, storage, sale and delivery of the property are heavy, exclusive of the marshal's fees, and with the duties, consume nearly one fourth of the gross amount of sales.

The gross amount of sales is \$6797 84. The duties amount to \$737 69, and the expenses above mentioned to \$586 58.

The rule of a moiety in cases of derelict is a moiety of the net amount deducting expenses, costs, &c.

Considering, however, the small amount of property saved compared with the labor and services rendered, I have felt constrained to exceed the *maximum* usually allowed in cases of derelict, so far as to allow three fifths, after deducting the duties, being a little more than a moiety of the gross amount. The expenses and costs, except those which have accrued by the litigation between the salvors, will be a charge upon the two fifths remaining.

The general rule of distribution between the salvors, is to allow the owners of the saving ship and cargo, one third of the salvage. This was the rule recognised by Mr. Justice Story, in the *Ewbank*, but which he admits should not be so inflexible as not to yield to extraordinary merits, or perils, or losses on the part of the owners. In the *Ewbank* one third was allowed the owners; in that case the judge observed, "neither of these has suffered any loss or injury, in tackle, apparel, keel, or cargo," &c.

In this case, the owners of the *Triton* lost that part of her cargo which was thrown overboard, and which, if it had arrived safe at this port, would have been worth as much as one half of the salvage allowed. To allow them, however, a full indemnity for property lost, expenses incurred, and property at risk, would deprive the officers and crew of salvage, by whose labors it was principally procured.

Under these circumstances, I allow the owners of the *Triton* and cargo a moiety of the salvage. In apportioning the residue between the officers and crew, I am instructed by the case of the *Ewbank*, that the general rule, under ordinary circumstances, has been to allow the master double the proportion of the mate. I perceive nothing in the circumstances of this case to induce me to depart from this rule.

The character of Hansen, who appears as sailing-master in the shipping paper, is somewhat anomalous. In the deposition of the master he is called nominal sailing-master, and from his own deposition it appears that he wished to ship as second mate, but was put down as sailing master to prevent his being under the command of the mate, and that extra wages were allowed him from his expected services as pilot, when they arrived on the north-west coast of America, and especially in Columbia river. In the distribution, I allow Hansen somewhat less than the mate, and a little more than the second mate. To Lord and McClellan, though shipping for high wages, I have allowed but a seaman's share, as their high wages had reference not to their superior services on board ship, but as fishermen and net-makers, in which capacity they were of little or no use in the navigation of the vessel, but whose labors were probably worth those of the other men, in getting out and loading on board the Triton, the cargo of the Adolphe.

The one moiety of the salvage allowed the officers and crew, I divide into fifty-three shares, to be distributed as follows:

To Caleb Williams, jr. master, ten shares; Stephen Hunt, supercargo, who was active in getting out the cargo, and commanded the men on board the Adolphe, nine shares; Joseph M. Smith, mate, five shares; Ephraim Hansen, four shares; David W. Wyman, second mate, three shares; Arthur Rayner, two shares; Nelson Crocker, two shares; George Fulton, two shares; Loyalist Mains, two shares; John B. Lord, two shares; Duncan McClellan, two shares; Dexter Taylor, one and a half shares; William Hart, one and a half shares; William Beverly, one and a half shares; William Jackson, one and three fourths shares; William Angell, one and one fourth shares; Daniel Adams, one and one fourth shares; and to Frank (the servant and apprentice of captain Williams), for his own use and benefit, one and one fourth shares.

Whatever costs may have accrued from the incipient litigation between the salvors are to be a charge on the portion awarded the salvors.

All other costs and expenses, except the duties which have been

provided for, are to be paid from the two fifths remaining for the owners of the *Adolphe* and cargo ; the residue is to remain in the registry of this court subject to the further order thereof, for the use and benefit of such person or persons, as may in this court make title thereto as owner or owners of the ship *Adolphe* and cargo, or such person or persons as may be legally authorized by them to receive the same.

I shall refer it to the clerk of this court, to ascertain and report the amount of salvage due to each party as above stated, and the decree will be drawn up accordingly.

IV.—FRENCH CASES.

Selections from the decisions of the *Cour de Cassation*, published in the *Revue de Legislation et de Jurisprudence*.

Bill of Exchange. The proprietor of a bill of exchange, who transmits it to a bankrupt, subsequently to the failure of the latter, has a right to revendicate it in the hands of persons, who hold it in good faith, by means of an indorsement from the bankrupt. *Pongerard contre Warequé*, 1, 155.

Liability of the owner of a vessel. The owner of a vessel is indefinitely responsible for all the acts of the captain, within the sphere of his authority, and especially for bottomry loans contracted in the course of a voyage ; and it is only in those cases, where there is some misconduct (*delit*) or quasi-misconduct on the part of the captain, that the owner may relieve himself from all responsibility by abandoning the ship and freight. *Tourrel c. Fabry*, 1, 230.

Rescission of a Sale. The effect of the dissolution of a sale, for default of payment of the price, being to remit things to the same or a similar state, in which they would have been if no sale had intervened, the purchaser is not liable for the interest of the stipulated price, for the time during which he was in possession, but only for a restitution of the fruits received by him. *Branche de Merlox c. Hue de la Blanche*, 1, 311.

LEGISLATION.

WISCONSIN TERRITORY. By an act of the congress of the United States, passed April 20th, 1836, a portion of the then territory of Michigan was constituted a territory, for the purposes of temporary government, by the name of Wisconsin. This act, denominated the "organic law," provides a form of government for the new territory, similar to the general form of the state governments, except in those particulars, wherein the territory remains dependent upon the government of the United States. On the ninth of September following, the governor of the territory issued a proclamation, setting forth the apportionment made by him, in pursuance of the act of congress above-mentioned, of the members of the council and house of representatives therein provided for the government of the new territory, and directing the time and mode of their election. The members so to be elected were directed to convene on the 25th day of October then next ensuing, for the purpose of organizing the first session of the legislative assembly of the territory.

The legislative assembly of the territory of Wisconsin, elected and convened in pursuance of the governor's proclamation, at the first session thereof, which commenced on the 25th of October, 1836, passed forty-two acts and three joint resolutions, mostly of a public and general character.

Improvements on public lands. All contracts, promises, &c. either written or verbal, hereafter made in good faith and without fraud, collusion or circumvention, for the sale or purchase of improvements made on lands owned by the government of the United

States, are made valid in law and equity, and may be sued and recovered on like other contracts. No. 8. § 1.

All deeds of quitclaim or other conveyances in writing, *bona fide* made, for the transfer or conveyance of improvements upon such public lands, are declared to be as binding and effectual in law, for conveying the title of the grantor in and to the same, as in other cases. § 2.

Incorporation of towns. The first section of an act, to incorporate such towns as wish to be incorporated, provides, that, whenever the white male inhabitants over the age of twenty-one years, being residents of any town or village of any number of dwellings situated contiguous and convenient for such purpose, containing not less than three hundred persons, shall wish to become incorporated for the better regulation of their internal police, such of the residents as have been so for six months may assemble themselves together in public meeting, and may proceed to choose a president and clerk of the meeting, and, being so assembled and organized, may decide by vote whether they will be incorporated or not. The succeeding sections of this statute contain provisions in detail for the organization and government of towns, which shall so vote to incorporate themselves. No. 17.

Title to lands.—The receiver's receipts or certificates of the purchase of public lands, signed by the receiver, are declared to be evidence in any court, of the title to the lands therein mentioned. No. 23.

Attorneys and Counsellors at Law. Any person, who shall apply to any of the judges of the supreme court, to be admitted as an attorney or counsellor at law, and shall satisfactorily show that he is residing within the territory, that he has resided therein for three months immediately preceding the application, is of a good moral character, and possesses the requisite knowledge of the science and practice of the law, the judge may grant such applicant a license to practise in any and all courts of record within the territory: but no person can be examined or admitted, who is not a citizen of the United States, of the age of twenty-one years, and who does not satisfy the judges that he has diligently pursued the study of the law for at least two years in the office of some re-

spectable practitioner within the territory or the United States, or that he has attended, at some approved law school or university, where legal studies form a part of the academic course of instruction, a course or courses of legal lectures for a time not less than one year, and the residue of the time of the said two years with some practitioner as aforesaid. No. 24.

Legislative Assembly. The legislative assembly shall commence its session annually on the first Monday of November in each year. No. 35.

Banks, Railroads, University. At this first session of the legislative assembly of Wisconsin, three banking and two railroad companies were incorporated, and a university established by the name of the "Wisconsin University," at Belmont in the county of Iowa.

GREAT BRITAIN. The statute 1 Victoria, ch. 26, which went into operation on the first of January last, makes some important alterations in the law relating to

Wills. The following are the regulations to be observed in the making of a will or codicil: 1. It must be signed at the foot or end thereof by the testator; 2. If he does not sign, it must be signed by some other person in his presence; 3. The signature must be made or acknowledged, by the testator, in the presence of two or more witnesses, present at the same time; 4. The witnesses must attest and subscribe in the testator's presence. A will or codicil may be revoked: 1. By the marriage of the testator; 2. By a will or codicil executed as above-mentioned; 3. By a writing declaring the intent to revoke, and executed as a will; 4. By burning, tearing or destroying the will by the testator, with an intent to revoke, or by some person in his presence and by his direction. Alterations made in wills must be executed in the same manner as wills; but the signature of the testator and the subscription of the witnesses may be made in the margin, or opposite or near to the alteration, or at the end of a memorandum on the will, referring to the alteration. Persons under the age of twenty-one are incompetent to make a will.

CRITICAL NOTICES.

1. *The statutes at large of South Carolina; edited under authority of the Legislature, by THOMAS COOPER, M.D., L.L.D.* Volume first, containing acts, records, and documents of a constitutional character, arranged chronologically. Columbia, S. C. 1836.

WE believe that Virginia alone, of all the states, possesses a uniform edition of statutes at large: and, to her praise be it spoken, she, many years ago, led the way in this excellent undertaking. What Massachusetts formerly did in the republication of her colony and province laws, and has recently done in the republication of the laws of Plymouth colony, though praiseworthy so far as it extends, is very far from satisfying the idea of statutes at large. In South Carolina a good beginning has been made in this work, under the patronage and at the expense of the state. Its successful accomplishment seems secured by the zeal which the legislature has already manifested, and by the ability and industry of Dr. Cooper, the learned editor. The first volume contains matter chiefly of a constitutional character, and its contents are very miscellaneous. The first article is an introduction to the province laws of South Carolina by Nicholas Trott, a judge of some distinction in the province early in the last century. This is followed by the two charters of Charles II., to the earl of Clarendon and others, lords proprietors—John Locke's fundamental

constitution for the province, at full length, with a formidable array of landgraves and caciques, hereditary nobles with baronial possessions and dignities, grand councils, parliaments, judicatories, &c. &c., proving, if proof were necessary, how utterly incompetent are abstract politicians and speculative scholars, to construct a frame of government for man as he is. The volume also contains the surrender by the proprietors to the king in 1729, of all their title and interest in the province, a copy of magna charta, and of several other old charters—the petition and bill of rights—the state constitutions of South Carolina—the old confederation—the constitution of the United States—documents relating to the boundary line of South Carolina—to the cession of the territory north west of the river Ohio, &c. The foregoing comprise about half of the volume, and the remaining half is taken up with nullification, from its inception, in hostility to the protective policy, and including the Virginia embassy, down to its termination in 1833. Of course, all these documents are inserted by Dr. Cooper *con amore*. The address to the people of the respective states is included among them, but the doings of various state legislatures in reply thereto, and signally rebuking the South Carolina doctrine, are not of the number. It should seem that these latter are sufficiently connected with the history of the question, and with the address, to warrant, nay, to require, a publication in a volume purporting to set forth nullification doings, especially since Dr. Cooper has embraced in the volume the proceedings of the Virginia legislature, and of Mr. Leigh, the commissioner.

The succeeding volumes will contain the *statutes at large*, beginning with the earliest, and embracing all the acts of the legislature, whether repealed, obsolete, or in force; with appropriate notes and references to acts of assembly, and adjudged cases.

We sincerely hope that the other states may be induced to follow the commendable example of Virginia and South Carolina. The period is favorable for it; the facilities are probably abundant for a successful prosecution of the work, in most if not in all of the states; while its completion would be a very happy triumph of good sense and true patriotism, over the little party warfare of the day.

- 2.—*Reports of cases argued and adjudged in the Supreme Court of the United States. January Term, 1837.* By RICHARD PETERS, counsellor at law and reporter of the decisions of the Supreme Court of the United States. Vol. XI. Philadelphia: DESILVER, THOMAS & Co. 1837.
- 3.—*A General View of the Origin and Nature of the Constitution and Government of the United States, &c.* Philadelphia. 1837.
- 4.—*North American Review, No. 98, for January, 1838. Article VII. Constitutional Law.*
- 5.—*The United States Magazine and Democratic Review, No. 2, for January, 1838. Article I. The Supreme Court of the United States: its Judges and Jurisdiction.*

We have placed these four publications together, for the purpose of directing the attention of our readers to what may be called the commencement of a new era in our constitutional jurisprudence, of which, as faithful journalists, we cannot omit to take notice. The eleventh volume of Mr. Peters's Reports, containing the cases of the January session of 1837, presents us with the decisions of four cases, involving great constitutional questions, which had long been pending in the supreme court of the United States, but which had not been before decided, in consequence of the court not being full.

The first case, to which we have alluded, is that of the city of New York *v.* Miln. This case came before the supreme court, on a question certified from the circuit court, whether an act of the legislature of New York, regulating the landing of passengers from foreign countries in that state, assumed to regulate trade and commerce, and was therefore unconstitutional and void? The opinion of the court, which was delivered by judge Barbour, affirmed the validity of the act in question. Judge Thompson concurred in the opinion of the court, but upon grounds somewhat different. Mr. justice Story dissented, and stated his own opinion, that the act was unconstitutional. He added, that the late chief justice, having heard the former arguments, had formed a deliberate opinion, that the act of New York was unconstitutional, and that the case fell directly within the principles established in the cases

of *Gibbons v. Ogden* (9 Wheaton's Reports, 1), and *Brown v. The State of Maryland* (12 Wheaton's Reports, 419).

In the second of the cases above-mentioned, that of *Briscoe and others v. The Bank of the Commonwealth of Kentucky*, the question was, whether the bills issued by the bank were "bills of credit," issued by the authority of the state of Kentucky, within the prohibition of the constitution of the United states. The opinion of the court, delivered by judge M'Lean, decided both branches of this question in the negative: the bills issued by the bank of Kentucky were not "bills of credit;" neither were they emitted by the state. Judge Thompson concurred in the first part of the opinion, and dissented from the other. He thought that the bills in question were not "bills of credit;" but that they were issued by the authority of the state of Kentucky. Mr. Justice Story dissented on both points; and in the commencement of his opinion, observed, that when the cause was formerly argued, a majority of the judges (including the late chief justice) were decidedly of opinion, that the act of Kentucky establishing the bank was unconstitutional and void, as amounting to an authority to emit bills of credit, for and on behalf of the state, within the prohibition of the constitution of the United States.

The third of these constitutional cases, and the last which we shall notice, is that of the *Charles River and Warren Bridges*, in which the general question was, whether the act authorizing the building of the latter impaired the obligation of any contract, entered into by the legislature of Massachusetts, with the proprietors of the former, in their act of incorporation. The court, in an opinion delivered by the chief justice, decided, that there was no impairment of the obligation of a contract, in the act authorizing the building of the Warren Bridge. Mr. Justice M'Lean delivered a separate opinion, concluding that the court had no jurisdiction, though he was clear that the merits of the case were with the complainants. Justices Story and Thompson dissented, the former in a long and learned opinion, in which the latter concurred.

The second of the publications, placed at the head of this notice, is from the pen of Mr. Justice Baldwin. It contains an elaborate exposition of his views of the origin and nature of the

constitution of the United States, followed by an opinion in each of the above-mentioned cases, and also in that of *Poole and others v. the Lessee of Fleeger and others*. It was intended, originally, as an appendix to Mr. Peters's eleventh volume ; but, as some delay would thereby have been occasioned in the publication of that volume, the author concluded to publish it by itself. The reasons for this publication are thus stated :

“ Though none of the judges who have concurred with the majority of the Court in their judgment in these cases, have delivered any separate opinion ; and though, having been more anxious as to the result, than the course of reasoning, the illustrations, or authority which led to it, it was my intention to have been content with a silent concurrence ; yet reasons which have since occurred, have determined me to present my views in each case to the profession. In all of them the result has accorded with my opinions, formed when the cases were first presented for our decision at former terms, and my most deliberate judgment at the present ; but in this respect my situation is peculiar, as none of the judges who sat during the former arguments, concur in all the present opinions of the majority. In the case of the Commonwealth Bank of Kentucky, I was in the minority ; in the Charles River Bridge case, it now appears that I stood alone after the argument in 1831 ; the Tennessee Boundary case [*Poole v. Fleeger*] hung in doubtful scales ; and in the New York case, I was one of a bare majority. By changes of judges and of opinions, there is now but one dissentient in three of the cases ; and though my opinion still differs from that of three of my brethren, who sat in the fourth, six years ago, it is supported by the three who have since been appointed. Placed in a position as peculiar now as it was then and since, I feel called upon to defend it, and to explain the reasons why it was then assumed and is now retained.”

Mr. Justice Baldwin, having determined to publish his opinions in the four cases alluded to, deemed it necessary to introduce and explain them by a preliminary general view.

“ As my opinions, on constitutional questions, are founded on a course of investigation different from that which is usually taken, I cannot in justice to myself, submit them to the profession without a full explanation of what may be deemed my peculiar views of the constitution. By taking it as the grant of the people of the several states, I find an easy solution of all questions arising under it ; whereas, in taking it as

the grant of the people of the United States in the aggregate, I am wholly unable to make its various provisions consistent with each other, or to find any safe rule of interpreting them separately. In a matter of such importance as this, I cannot *assume* a proposition on which all my opinions depend, but must establish it by all the authority that can be brought to support it, against opposing opinions of great weight, and which are those most commonly received. Without doing this, my premises would be at once declared unfounded, and my conclusions of course erroneous; it is therefore necessary for me to take this course, or withhold any publication of my opinions."

The cases of the bank of Kentucky and of the New York passenger law were decided by the opinion of six judges against one; the bridge case was decided by the opinion of five against two; and the dissenting opinions in the first two cases were concurred in by the late chief justice. It is pretty clear, therefore, that, in relation to the three great constitutional subjects of bills of credit, the regulation of commerce, and the obligation of contracts, a new era has commenced in our constitutional jurisprudence.

It is not our present purpose to make any remarks on this change. A more fit opportunity, which we may perhaps avail ourselves of, will occur, when the manuscripts of the late Mr. Madison shall be published. His reports of the debates in the convention, which formed the constitution, will undoubtedly furnish the fullest and most authentic exposition of the views of the framers of that instrument which it is possible now to obtain; and it will be in the highest degree curious and interesting, to say nothing of its importance, to institute a comparison between the intention of the framers of the constitution, and the actual working, for half a century, of the form of government thereby instituted.

The indications, afforded by the decisions in the cases above-mentioned, of a change in the constitutional doctrines of the supreme court, have given occasion to two articles in cotemporary journals,—the *North American Review* and the *United States Magazine and Democratic Review*,—of a precisely opposite character, which may perhaps be taken as evidence of the different temper, in which the change alluded to is likely to be received by different parties. We subjoin an extract from each.

The writer in the North American, towards the conclusion of his article, makes the following remarks :—

“ It cannot be concealed, in point of fact, that we have fallen under a new dispensation, in respect to the judiciary. The difference amounts to something more than ordinary variation. The loadstone has lost something of its polarity. New points of observation have been discovered and pursued, distinct from the astronomical north. Whether the judiciary has any proper volition or not, it is quite plain that it has acquired a new inspiration and impulse. What was the law of the court upon some important points remains so no longer. Within a brief space, we have seen the highest judicial corps in the union wheel about in almost solid column and retread some of its most important steps. It is quite obvious that old things are passing away. The authority of former decisions, which had long been set as landmarks in the law, is assailed and overthrown, by a steady, destructive aim, from the summit of that strong hold, within which they had been entrenched and established.” p. 153.

“ There are obvious reasons enough for not exaggerating inferences of an unfavorable kind, in regard to the present or future condition of the judiciary, but we can hardly avoid the reluctant impression, that it has already capitulated to the spirit of the old confederation; and that we are fast returning, among other things, to an old continental currency, and to what were once denominated, moreover, anti-federal doctrines. Under the progressive genius of this new judicial administration, we can see the whole fair system of the constitution beginning to dissolve, like the baseless fabric of a vision; and we may well seem to say, in view of all the toil and service and sacrifice of the past, *ibi omnis effusus labor!*” p. 154.

A different feeling is manifested in the United States Magazine :

“ The late *renovation* in the constitution of this august body, by the creation of seven of its nine members under the auspices of the present democratic ascendancy, may be regarded as the closing of an old, and the opening of a new era in its history. And certainly to those who have looked on, for so many a weary year, in sorrow and almost in despair, at the career of high-handed judicial legislation, which it was so proudly pursuing, this correction—salutary, however tardy—of the anti-democratic tone of principle, that has so long characterized it, affords a subject of sincere congratulation. The new cycle, then, that has just dawned, presents a fit occasion for a retrospect of the past measures, which we will intersperse with a few characteristic sketches of the men

and manners, of that dignified *banc*. By establishing in the public mind, at this time, distinct ideas of the errors of the past, we shall most effectually guard against their possible recurrence for the future." p. 143.

6.—*The History of Rome*. Philadelphia : CAREY, LEA AND BLANCHARD. 1837. 8vo. pp. 482.

7.—*History of the Fall of the Roman Empire, comprising a View of the Invasion and Settlement of the Barbarians*. By J. C. L. DE SISMONDI. Philadelphia : CAREY, LEA AND BLANCHARD. 1835. 8vo. pp. 500.

8.—*Roman Antiquities: or an account of the Manners and Customs of the Romans, &c.* By ALEXANDER ADAM, L. L. D., Rector of the High School of Edinburgh. With numerous notes and improved indices. By JAMES BOYD, L. L. D., one of the masters of the High School, Edinburgh. Illustrated by upwards of one hundred engravings on wood and steel. Sixth edition. London : THOMAS TEGG AND SON ; &c. 1836. 18mo.

The two works first above indicated appeared originally as parts of Dr. Lardner's Cabinet Cyclopaedia. The first of them brings down the history of Rome from the earliest period to the founding of Constantinople ; and embodies the results of the labors and researches of the eminent modern German authors, who have written on ancient history. In the following short and modest advertisement, the author indicates the authorities and sources to which he is indebted.

"In a field, where the labors of eminent foreign historians have rendered originality a difficult feat and a doubtful merit, it behoves a writer not affecting novelty to name his principal sources and authorities. This has been done, in case of occasional reference, at the foot of the pages. The authors, from whom more important points have been abstracted are, in the first book, Niebuhr, in his third (untranslated) volume ; Wachsmuth ; and Heeren, in his chapters on Carthage. But the largest contributions have been drawn, throughout the volume, from the great work of professor Schlosser, of Heidelberg ; and the views of manners and literature will be recognised by the German student as (it is hoped) useful selections from that author. A neglected book, the "*Scienza Nuova*" of Vico, has deserved acknowledgment long before the date of this notice, as throwing a strong original light on the early portions of

Roman history, and the primitive relation between patricians and plebeians.”

The second of the above-named works, after three chapters of interesting matter, takes up the narrative of the affairs of Roman history, at the founding of Constantinople, and terminates it with the end of the tenth century. “In this volume,” says the author, “I have been compelled to pass rapidly over events, and to dwell only on results; to abstain from all critical discussion, from all reference to authorities.”

These two works, besides their value to the general reader, form the most compendious, and at the same time by far the best, introduction to the study of the Roman law, which exists in our language.

Whilst directing the attention of our readers to the above works as an introduction, we cannot omit to recommend Dr. Boyd’s edition of our old friend of the Roman Antiquities, as a most valuable aid, to the study of Roman jurisprudence. The following extract from his advertisement specifies some of the advantages of this over former editions.

“The editor has availed himself of several valuable works that have appeared since the days of the learned author. Notes of considerable length will be found from Niebuhr’s Roman History, from Henderson on Ancient Wines, from Blair on Slavery among the Romans, and from the works of professor Anthon, of New York. These notes in some instances correct the mistakes, and in others, supply the deficiencies of the original work.”

Notwithstanding the severe criticism, bestowed upon Dr. Adam’s work by a French critic (in the *Themis*, vol. iv. p. 367), we believe it is altogether the best compendium of Roman Antiquities in the English language, and Dr. Boyd’s edition of it well deserves a republication in this country.

9.—*Report relating to the Incompetency of Witnesses, on account of Religious Belief. Made to the Senate of Massachusetts, January Session, 1838.*

This long and elaborate report has more of the air and character of a sermon than of a legislative document. It is principally

occupied with a summary of arguments, neither very ingenious nor very new, in favor of the existence of a God, and with declamatory invectives against atheism and atheists, all of which shew the writer to be an honest man, fearing God and loving his neighbor, but do not touch the essence and marrow of the question. It seems to be taken for granted that the atheist, as a punishment for his want of religious belief, should be deprived of the privilege of giving his testimony, and that after settling this question, the whole difficulty is surmounted. But, waiving the discussion of the point, whether either the Christian religion or the spirit of our institutions allows us to punish a man for opinions however erroneous, which are conscientiously adopted, is not the solution of the difficulty to be found in the answer to the question, whether society has not a right to the testimony of every individual in it, to be obtained under the sanction of an oath or not, according as the individual does or does not recognise the validity of such sanction? It seems to be assumed, that an oath is the only, whereas it is the highest, guaranty of the truth of what is spoken. If there should ever be a great crime committed under such circumstances, that the only person who could testify to it, was a person incompetent on account of religious belief, though of unimpeached veracity in the ordinary transactions of life, we should then perceive the inconveniences of a rule of law which is now supported by so many excellent and upright men, and which no one can attack without being in danger of having his character assailed or at least his motives impugned.

10.—*Reports of Cases adjudged in the Supreme Court of the Province of New Brunswick, commencing in Hilary Term, 1835.*

By GEORGE F. S. BERTON, barrister at law. Fredericton: John Simpson, printer to the king's most excellent Majesty. 1835.

This number, consisting of two hundred and four pages, of the usual size of law reports, contains the cases decided in the supreme court from Hilary Term in the fifth, to Trinity Term, in the sixth year of the reign of William IV. both inclusive. Mr. Berton reported the first one hundred and ten pages, coming down to Hilary Term, sixth of William IV., in a private capacity, and

the remainder, as reporter to the court, appointed pursuant to a statute passed March 8th, 1836, (6 William IV. c. xiv.) to provide for reporting and publishing the decisions of the supreme court. This act, recognising the great importance of obtaining correct reports of the decisions of the supreme court of the province, authorizes the commander in chief, for the time being, by and with the advice and consent of his Majesty's executive council, to appoint some suitable person, learned in the law, to be reporter of the opinions, decisions, and judgments of the said court. Such reporter is required to obtain, by personal attendance, or otherwise, true and authentic reports of said opinions, decisions and judgments, and to publish not less than two hundred copies of the same in pamphlets, after each term of said court. The sole liberty of printing, reprinting and publishing such reports is vested in the reporter, his heirs and assigns ; and he is entitled to receive annually from the province treasury fifty pounds in addition, on the certificate of the chief justice, that he has diligently performed the duties of his office. The act is to continue in force for three years.

The reporter has given a clear and concise statement of the opinions of the court, which are generally characterized by learning and good sense. The English authorities being constantly referred to, we were not a little surprised to find it stated by one of the learned judges, that the year books were not to be found in the province. The general principle, that the statute law of England, existing at the time of the settlement of any colony, prevails therein, so far as it is applicable and adapted to its circumstances, imposes upon the court the necessity of investigating many questions similar to those, respecting the extension of the English laws to the colonies, so frequently discussed in our own colonial courts before the American revolution. As these questions involve many political elements, the decision of them is frequently a matter of great delicacy.

We are happy to discover that no royal scruples in the minds of the judges deter them from using freely as precedents, the general understanding of the legislatures, and courts, in the former North American colonies ; and the opinions of the most distin-

guished American jurists of the present day, on points analogous to those which come before them for decision. In *Doe ex dem. Hannington v. M'Fudden*, on the question, whether the statute of uses, 27 H. 8. c. 10, and the statute of inrolments, 27 H. 8. c. 16, extend to and are in force within the province, decided in the affirmative, the arguments of counsel, and the opinions of the judges, do them much credit as liberal and enlightened jurists.

The moral elements of legal decisions, constituting the soul of universal jurisprudence, are the same in all countries, at all times: but their external subject-matter undergoes successive changes in the same country, and is seldom the same in countries geographically dissimilar.

11.—*Introductory Lecture on the Dignity of the Law as a Profession, delivered at the Cincinnati College, on the 4th of November, 1837.* By TIMOTHY WALKER, Professor of Law. Cincinnati: 1837.

All the productions of Mr. Walker, which we have seen, are characterized by a degree of manly strength, freedom of tone, and comprehensiveness of thought, which are not often met with in the professional writings of lawyers. The lecture before us, on the dignity of the law as a profession, was delivered before the law department of the Cincinnati College, on the 4th of November last, as an introduction to the author's course of instruction for the season. It contains a bold and spirited outline of the various branches of legal science, and of the subjects with which the law is conversant.

The term *dignity* implies relation, and is somewhat indefinite, except to express the result of a comparison of two or more things. If, therefore, we would estimate the dignity of the law as a profession, we must institute a comparison between it and some other or all other professions. An inquiry of this kind would enable us to say, which of all these professions or occupations is the most or least dignified, in comparison with the others. But in order to make this comparison, we must first find in the given subjects the proper points of comparison; or, in other words, we

must ascertain by analysis those elements of each, which determine its place in the scale of dignity. Mr. Walker does not undertake to settle the relative rank of the profession of the law; but simply to develop and exhibit those of its elements, in which its dignity may be said to consist.

Mr. Walker first speaks of the necessity of human laws, and of their proper scope, and then presents a condensed view of the prominent subjects embraced in a course of legal study: the law of nations, and nearly allied thereto, the conflict of laws between different nations;—constitutional law;—statute, common, and equity, or chancery law;—the law of persons;—the law of property;—the law of crimes;—and common law, chancery, and criminal procedure. The address is concluded by some very just and eloquent remarks on the province of the lawyer, and the character of the employment to which he is called by his profession.

While Mr. Walker entertains an exalted opinion of the dignity and importance of the legal profession, he is not unmindful, but, on the contrary, he seems to be the more mindful, of those defects in our legal systems, which are manifest to almost every body but lawyers, and of those professional prejudices, which render almost all lawyers blind to them. While indulging a just pride in the profession, which he has chosen as the sphere of his activity, he never for a moment forgets, that it is subordinate to his character of "a man and a citizen."

12.—*An Essay on the Juridical History of France, so far as it relates to the Law of the Province of Lower Canada: Read at a special meeting of the Literary and Historical Society of Quebec, the 31st day of May, 1824.* By the Honorable J. SEWELL, L. L. D., Chief Justice of Lower Canada. Quebec: Thomas Cary & Co. 1824. 8vo. p. 34.

The sovereign council of Quebec was established in 1663; and the law, which was then in force and administered in the Vicomté of Paris, became from thence, and has since continued to be, the common law of Lower Canada. The learned tract of chief justice Sewell is devoted to an inquiry into the origin and history of

French law, with particular reference to that part of it, which constitutes the common law of Lower Canada, from the earliest period to the time of its establishment therein as above-mentioned.

It is a curious fact in juridical history, that the French law, as it existed prior to the immense reforms which it underwent during and immediately subsequent to the revolution, is the basis of the common law of a wide region at one extremity of this continent ; whilst the same law, purified and reformed by the fiery ordeal of the revolution, lies at the foundation of the legal system of a rich and powerful state at the other ; and both, since the periods of their establishment, have received great modifications by the introduction of much of the peculiar spirit and many of the characteristic institutions of the English common and statute law. The legal systems of Lower Canada, and of Louisiana, have, therefore, for this if for no other reason, a strong interest for the philosophical jurist ; and we hope that the example of chief justice Sewell will stimulate others to follow in the track so ably and satisfactorily pursued by him, in his *Essay on the Juridical History of France*.

13.—*Report of the Committee appointed to revise the Penal Code, made to the General Assembly of Rhode Island, January Session, 1838, with the bill accompanying the same. Printed by order of the House of Representatives.*

This report affords very gratifying evidence of the liberal and enlightened views of the commissioners, Messrs. W. R. Staples, Samuel Y. Atwell, Henry Bowen, and Albert C. Green, who were appointed to revise the penal code of Rhode Island and adapt it to penitentiary punishments. The accompanying bill, which, we presume, has already become a law, without material alteration, is divided into eleven chapters ; the first seven of which are almost exclusively devoted to the description of particular crimes and offences, and in affixing a punishment to each ; and the remaining four are appropriated to the general subjects of crime and punishment and to the forms and incidents of criminal procedure. The commissioners recommend some important changes. But the principal improvement upon the old law is the

substitution of confinement in the state prison at labor, imprisonment in a county jail, and pecuniary fine, for the barbarous punishments of whipping, cropping, branding and the pillory. The bill does not provide for the punishment of any crime with death, on which point, the commissioners were equally divided in opinion. A separate report, signed by Messrs. Staples and Atwell, recommends the entire abolition of that form of punishment. We believe, that the views of these gentlemen have not been fully sanctioned by the legislature of Rhode Island; but to what, if to any extent they have been adopted, we are not at present informed.

There is one provision, which we could have wished out of the bill. We allude to the fifth section of the eighth chapter, which is as follows :

“Every act and omission, which is an offence at common law and for which no punishment is prescribed by this act, may be prosecuted and punished as an offence at common law. Every person who shall be convicted of any such offence at common law, shall be imprisoned for a term [not?] less than one year, or fined not exceeding one thousand dollars.”

This vague form of defining crimes, in a statute professing to contain an enumeration of prohibited acts and omissions, for the information of the citizens, approximates too nearly in character to an *ex post facto* law, to be quite consonant with our notions of proper criminal legislation.

14.—*A Digest of the Laws of the United States, including an Abstract of the Judicial Decisions relating to the Constitutional and Statutory Law.* By THOMAS F. GORDON. Philadelphia : 1837.

This is a second edition of a work, which, as a digest of the statute laws of the United States, is extremely valuable, and as affording almost the only practicable means of access to those laws, is quite indispensable.

The author, in his preface, notices all the important particulars, in which the second differs from the first edition of his digest, which we have already described in the last October number of our journal. The principal change, which we think is also a

decided improvement, is, that the judicial decisions, illustrative of the statutes, are presented in the form of copious notes, appended to the appropriate text, instead of being incorporated with it, as in the former edition.

15.—*Twelfth Annual Report of the Board of Managers of the Prison Discipline Society, Boston, May, 1837.* Boston: 1837.

The twelfth annual report of the Prison Discipline Society, in a pamphlet of more than one hundred closely printed pages, contains a great mass of interesting matter, arranged under the heads of asylums for poor lunatics—state prisons—county prisons, and houses of correction—houses of refuge and farm school—imprisonment for debt,—and capital punishment. The speeches of several gentlemen, at the anniversary of the society in May last, are published in the appendix, together with the report of a special committee of the parliament of Lower Canada, in 1836, on the subject of the establishment of a penitentiary system in that province, several tables of the statistics of crime and insanity, plans of the new penitentiary in Kingston, (Upper Canada), and of the new county prison in Hartford, (Conn.) and a description of the latter. The first head of this report, that of “Asylums for Poor Lunatics,” occupies thirty-seven pages, and affords abundant evidence of the increased attention, which is now given in various parts of the United States and in the adjoining British provinces, to the care and custody of those insane persons, who are subject to restraint by the public authority, either as paupers or as dangerous to be at large.

INTELLIGENCE AND MISCELLANY.

The Law Reporter. This is the title of a new law journal, the first number of which has been recently published in Boston, by Messrs. Weeks, Jordan & Co. It is to be conducted on the plan of the (*London*) *Legal Observer*, and to be published once a fortnight, in numbers containing sixteen octavo pages each. "The main object of the work," as stated in the prospectus, "is to afford a medium of communication for such *legal matters of fact*, as may be useful and interesting to gentlemen of the bar, and to give the profession, *immediately* so far as it can be done by a periodical work of frequent publication, accurate and condensed reports of the most important cases decided by the superior courts of civil and criminal jurisdiction." The plan of this work must recommend it to the legal profession, as calculated to supply a want which has been considerably felt; and the ability and spirit, manifested by the editors in their first number, will, doubtless, ensure their periodical a corresponding degree of success.

[From the *Westminster Review*, vol. xx. p. 72.]

Felonies and Misdemeanors. The favorite classification of offences is into *felonies* and *misdemeanors*; though these epithets give no more idea of the nature of the offences, to which they are applied, than if two Chinese words were used in their stead. A very vague idea of the quantum of punishment, which may be awarded to the offender, is the full extent of the information conveyed by them; for some misdemeanors are punished as severely as many felonies, always excepting that iniquitous adjunct to the punishment of all felonies, the forfeiture of goods and lands. Should an ignorant man wish to know something more of the meaning of these terms, he may learn that a starving child who

steals a penny-loaf is guilty of felony, while a man who forges the mark of the Goldsmith's Hall on plate to any amount is only guilty of a misdemeanor. The man who administers an unlawful oath is guilty of felony, but the man who falsely swears away the life of another is only guilty of a misdemeanor. An apprentice, who appropriates a shilling to his own use received on his master's account, commits a felony ; while the man, who maliciously destroys the dam of a mill-pond, is only guilty of a misdemeanor. So much for classification and consistency.

[From the *Revue de Legislation*, &c. vol. i. p. 117.]

Advocate's Oath in Geneva. The following is the form of the advocate's oath, prescribed by a law, adopted by the representative council of Geneva June 20, 1834.

I swear before God, to be faithful to the republic and canton of Geneva ;—never to swerve from the respect due to the tribunals and to the authorities ;—not to advise or maintain any cause, which does not appear to me to be just or equitable, unless in the defence of an accused ;—not to employ knowingly, in order to maintain the causes which shall be confided to me, any means contrary to the truth, and not to attempt to deceive the judges by any artifice, or by any false exposition of facts or of law ;—to abstain from all offensive personality, and not to advance any fact against the honor and the reputation of the parties, unless it be indispensable to the cause, with which I shall be charged ;—not to encourage the commencement or the carrying on of any process, from any motive of passion or of interest ;—and not to refuse, from any personal considerations, the cause of the feeble, the stranger, or the oppressed.

Registries of Deeds. By a return from twelve of the seventeen registries of deeds in Massachusetts, for the year 1837, it appears, that the whole number of deeds recorded therein during that year was 27,640 ; whole number of other instruments 3,057 ; amount of fees received for recording deeds \$12,231 49, and for recording other instruments \$2,562 46 ; and the number of legal pages covered by the recording 86,285.

QUARTERLY LIST OF NEW PUBLICATIONS.

GERMANY.

Arndts, Dr. L., Beiträge zu verschied. Lehren des Civil-rechts u. Civil processes. 1st Hft. Bonn, Marcus.

[Contributions to various doctrines of the civil law and civil process.]

Buhler (zu Brandenburg), Dr. Edm. R. v., über das Duell und seine wissenschaftl. Stellung im Systeme des Strafrechts, nebst Vorschlägen zu seiner legislat. Behandlung. Ulm, Nübling.

[Dr. von Buhler, of Brandenburg, on the duel, and its proper place in a system of criminal law, together with propositions for legislative provisions in relation thereto.]

Dirksen, H. E. Manuale latinitatis fontium juris civilis Romanorum, thesauri latinitis epitome fasc. I. et II. 4. Berlin, Duncker u. Humblot.

England's Gesetzgebung im Fallitenwesen, von M. Straffort-Carey u. M. Fölix. Deutsch bearbeitet von *Dr. F. C. Feller*. Leipzig, Hinrichs.

[The English Law of Bankruptcy, by Messrs. Strafford Carey and Felix.]

ENGLAND.

A Treatise on the Law of Mortgage. By *Richard Holmes Coote*. 2d ed.

A Treatise on the Practice of the Court of Chancery; with an Appendix of Forms and Precedents of Costs, adapted to the last New Orders. By *John Sidney Smith*. 2d ed. revised and enlarged. 2 vols. 8vo.

The New Practice of the Courts of King's Bench, Common Pleas and Exchequer of Pleas, in Personal Actions and Ejectment; &c., containing all the recent Statutes, Rules of Court, and Judicial Decisions, relating thereto. By *William Tidd*. Royal 8vo.

A Practical Treatise on the Law of Trusts and Trustees. By *Thomas Lewin*. Royal 8vo.

A Breviary of the Poor Laws, &c. By *W. Robinson*.

An Exposition of the Practice relative to the Right to Begin

and Right to Reply, in Trials by Jury and in Appeals at Quarter Sessions. By *William M. Best*.

The Act for the Amendment of the Law of Wills. By *R. Lush*. 12mo.

The Act to amend the Law of Wills. By *P. Foster*. 12mo.

The Law of Bills of Exchange, &c. By *C. W. Johnson*.

Lord Holt's Judgment on the Privilege of Parliament. Royal 8vo.

A Treatise on the Law of Copyhold Property. By *H. Stalman*. 8vo.

UNITED STATES.

A Treatise on the Medical Jurisprudence of Insanity. By *I. Ray*, M. D. Charles C. Little and James Brown.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*. Vol. XVI. Boston: Charles C. Little and James Brown.

Commentaries on Equity Pleadings in England and America. By *Joseph Story*. Boston: Charles C. Little and James Brown.

Reports of Cases argued and determined in the Supreme Court of Judicature and in the Court for the Correction of Errors of the state of New York. By *John L. Wendell*, Counsellor at law. Vol. XVI. Albany: 1837.

A Plea for Authors and the Rights of Literary Property. By an American. New York: 1838.

The Law Library, edited by *Thomas J. Wharton*, Esq., and published by John S. Littell, Philadelphia. Nos. 55, 56, and 57, containing:

A Selection of Leading Cases on various branches of the Law, with notes. By *John William Smith*, Esq., of the Inner Temple, Barrister at Law.

The plan of this work is excellent. We are glad that it has been republished in this country.

IN PRESS.

A Digest or Abridgment of the Law of Real Estate. By *Francis Hilliard*, Counsellor at Law. Boston: Charles C. Little and James Brown.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By *Octavius Pickering*. Vol. XVII. Boston: Charles C. Little and James Brown.

AMERICAN JURIST.

NO. XXXVIII.

JULY, 1838.

ART. I.—ON THE LAW OF POSSESSION.

Analysis of Savigny's Treatise on the Law of Possession.

By Professor L. A. WARNKÖNIG.

[Concluded from the last number, page 49.]

§ 3. *Of the Loss of Possession.*

Azo, one of the most ancient of the glossators, had already made the remark, that it is not necessary for a legislator to establish principles concerning the manner of *preserving* possession, since it continues until it is lost; so that when we know the modes of acquiring and losing, we thereby know the duration, of possession. This fact, besides, did not escape the notice of the compilers of the *Corpus Juris*: for it is implied in the title *de acquirenda vel amittenda possessione* of the digest, and in the title *de acquirenda et retinenda possessione* of the code. Still, this simple observation was not understood by the commentators; some of whom lost themselves in long theories, concerning the means of preserving possession. Savigny does not follow their example: but, after explaining how possession is ac-

quired, he proceeds to consider in what manner it may be lost.

It is certain, that he, who has the will no longer to possess a thing and who ceases to detain it, can no longer be considered as possessing it. But the possession ought equally to terminate, even when a single one of the two conditions, necessary to its existence, ceases; and this is the principle, contained in the Roman laws: *possessio amittitur aut animo, aut corpore*.¹

Though this principle is evidently drawn from the nature of the elements which constitute possession, it has not been beyond the reach of attack; and, in opposition to it, a fragment from the jurisconsult Paul, which is twice quoted in the digest, viz. : in the law 153, D., 50, 17, and in the law 8, D., h. t., has been brought forward. The following is the text of the law 153:

“Fere quibusdam modis obligamur, iisdem in contrarium actis liberamur; cum quibus modis acquirimus, iisdem in contrarium actis amittimus. *Ut igitur nulla possessio acquiri nisi animo et corpore potest, ita nulla amittitur nisi in qua utrumque in contrarium actum.*”

This fragment, which is opposed to a crowd of other texts, and repugnant (apparently) to the nature of things and to reason, has been put to the torture by the interpreters; some of whom have believed it to be altered, and have attempted divers corrections, as, for example, to replace the word *utrumque* by *utcumque*, *utrumcunque*, *utrum*, &c. But the construction of the phrase is opposed to every change of the language. Savigny attempts to explain the passage as it is; but his discussion is somewhat long, and we are the less inclined to go into it here, for the reason, that all the authority of Paul, supposing him to have really mistaken the principle above established, would

¹ L. 44, § 2, D. h. t.; Savigny, p. 542.

not create the least doubt in our mind, in regard to its truth.

We shall not hesitate, therefore, to repeat, with Savigny, that possession is lost in two modes:

1. *Corpore* or *facto*, that is, by an act, which occasions a cessation of the natural detention of the thing: and

2. *Animo* (*in contrarium actio*), by the resolution no longer to will to possess.

We shall follow our author, in the developements, which he presents, in relation to both these modes; and shall terminate this part of the subject, by inquiring:

3. When and how is that possession lost, which one has by another person?

1. *Loss of possession by act.* Inasmuch as the detention of a thing consists in the possibility of disposing of it at our pleasure, the possession ceases, from the moment that this possibility is at an end; and, therefore, when we cease to have the ability to exercise a physical power over the thing, we are no longer the detainers of it.¹

It is natural, that the detention should be destroyed by the destruction of the thing; or by the decease of the detainer, or when he happens to be reduced to slavery.²

In regard to other cases of the cessation of detention, a distinction must be made between things movable and immovable.

I. The possession of movable things is lost:

1. When another person seizes the thing, in a violent or clandestine manner; for the thing is thereby withdrawn from our power, even when he, who seizes it, does not thereby acquire the possession.³

¹ It is in this sense, that Nerva says, in the law 3, § 13, h. t.: *Hactenus nos possidere, quatenus, si velimus, naturalem possessionem nancisci possimus.* Savigny, p. 349, n. 1.

² L. 30, §§ 3 and 4, D. h. t.

³ L. 15, D. h. t., and l. 24, ib. This rule does not hold, where a slave subtracts a thing, which belongs to his master; for, in that case, the master continues to possess by the slave.

2. When the place where the thing is becomes unknown or inaccessible to us.¹ But this rule must not be extended to mean, that we lose the possession of a thing which is in our custody, by the fact alone, that we are unable to find it at some particular moment, because we cannot precisely recollect the place where it is.

3. The domestic animals are possessed in the same manner as other things, and the possession of them is lost in the modes above indicated; but a wild animal ceases also to be in our possession, from the moment when he escapes from us and recovers his natural liberty; and, on the other hand, a tamed animal belongs to us, so long as he preserves the habit of returning to our power.²

II. The detention of immovable things cannot be lost by all the modes, which are applicable to that of movables, because they cannot be lost or withdrawn from our custody. But we lose this possession, if we are personally prevented, by any cause whatever, from exercising our power over the thing. It is to be observed, however, that the sickness or absence of the possessor must not be considered as one of these causes, because the sick or absent person may, notwithstanding, dispose of the thing by the instrumentality of another person. The following are examples of the loss of detention, by means of violence, committed against the possessor of an immovable thing.

1. Where one is treated, on the ground itself, as a slave or a prisoner.³

2. Where, by some act of violence, on the part of another, it becomes impossible for us to remain in contact with our ground (*dejectio*). In this case, it is indifferent also, whether he, who dispossesses us, is or is not, himself constituted the possessor of the land. This dispossession may take place

¹ L. 13, pr., & t. 25, pr., D., h. t.

² L. 3, § § 14 and 15, D., h. t.; Inst. 2; Savigny, pp. 361-365.

³ L. 1, § 47, D. 43, 16.

in two modes: either by a real violence, which expels us from our soil, or prevents us from re-entering upon it, or by the fear of imminent violence, which compels us to take to flight.¹

Some passages seem, in reference to this last point, to contradict the law 9:—Pomponius² and Paul³ say: that he, who has taken to flight, is not *vi dejectus*. But upon a little reflection, it will be seen, that these juriconsults do not say, that the party preserves his possession in this case, but only that he does not lose it, in such a manner, as to authorize him to have recourse to the interdict *UNDI VI*; or, in other words, that he is not *vi dejectus*.⁴

Whether the possession is lost by a seizure of the land by a stranger, during the absence of the possessor, is a question, in reference to which the Roman law has varied. In the time of Papinian, Paul and Ulpian, it was a settled principle, that the possession was not lost, in such case, before the absent possessor, having had knowledge of the occupation of his land, had experienced some resistance on the part of the detainer, or had suffered the latter to preserve the detention which he had assumed.⁵ In the time of Labeo, the opposite doctrine prevailed; but this began to be abandoned in the time of Pomponius.⁶ The reasons, upon which the juriconsults admitted the new doctrine, are, that the absent person, not knowing of the occupation of his land, and having, besides, the right to repel force by force, cannot be considered as dispossessed, so long as he is not informed of, and does not acquiesce in, the dispossession. And it is in this sense, that we are to understand the following proposition: *prædiorum possessio solo animo retinetur*.

¹ L. 33, § 2, D. 41, 3; l. 9, pr., D. (*Quod metus causa*) 4, 2.

² L. 1 § 29. D. 43, 16.

³ Sent. 5, 6, § 4.

⁴ Savigny, pp. 361–363.

⁵ L. 46; l. 3, §§ 7, 8; l. 6, § 1; l. 7, D., h. t.

⁶ See L. 6, § 1, and l. 7, D. h. t.; l. 18, §§ 3 and 4; l. 25, § 2, eod.

A natural consequence of the new principle is also, that one, who, in some sort, is always absent,¹ as for example, a madman or an infant, or, in a word, one, who cannot be informed of the taking possession, by another, of the immovable property which he possessed, does not lose the possession.²

2. *Loss of possession by the will.* He, who forms the resolution no longer to possess a thing, ceases immediately to be the possessor, even though he should preserve the detention: *amittitur possessio animo in contrarium acto.* The will no longer to possess is directly opposed to that to be the possessor; and, consequently, the possession, which was established by the concurrence of the will with the fact of detention, cannot from thenceforth subsist. A madman, or a pupil not authorized by his tutor, cannot cease to possess *animo*.³

He, who has commenced to revendicate, may nevertheless resort to the interdict *UTI POSSIDETIS*, because the act of revendicating proves any thing rather than the will no longer to possess the thing.⁴

Can the intention no longer to possess be inferred from simple acts of omission, as, for example, from the fact, that one leaves his house uninhabited and the doors open, or from the fact, that he neglects to cultivate his land? This question is discussed at length by the author.⁵

3. *Of the loss of possession which we have by another individual.* It remains for us to apply the principles, which have been above established, to the loss of possession, where we possess by the intervention of another.

It has already been observed, that the acquisition of possession by another rests upon three essential circumstances, to which it will be useful to recur, in the present connexion.

¹ See L. 209, D. 50, 16; l. 124, § 1, D. 50, 17.

² Savigny, p. 378.

³ L. 3, § 6; l. 17, § 1, D. h. t.; l. 30, § 4; l. 34, pr.; l. 29, D. ib.

⁴ L. 12, § 1, D. h. t.

⁵ Savigny, p. 382.

1. When we possess by another, we may lose the possession, in the same manner as if we were *immediate* possessors, by the will no longer to possess, though he, who is found directly in relation with the thing, persists in detaining it for us; for every possession ceases with the will to possess. But whilst this will subsists, and the third person preserves the detention, we remain the possessors; so that if we ourselves should be expelled from our ground by an act of violence, and the detention should be left with one, who intends to detain it for us, we should be considered as always having the possession by the instrumentality of that person. The law 1, § 45, D., 43, 16, decides this point expressly.

2. There may be a change of relation between the indirect (*mediate*) possessor, and the detainer, without a loss of possession on the part of the former: thus an emancipation of the son of a family, who should preserve the will to possess for his father, would not deprive the latter of his possession. In the same manner, one locatary may cede his quality of detainer to another, who may also detain the thing for us; and, in such case, we continue to possess by the sub-locatary.

3. We may lose the possession, by the act of him who detains for us: but, it is important, in reference to this point, to distinguish between those cases: 1. Where the detainer deprives us of the possession, by the will to become himself the possessor; and, 2. Where the detainer deprives us of the possession, without acquiring it himself, that is to say, by abandoning it, or transmitting it to a third person. Each of these cases will be separately examined.

First case. He who detains the thing, having by this alone the power to dispose of it at his pleasure, whenever he does not regard himself as subject in this respect to the will of another, we ought to say, conformably to the principles above established, that the detainer will begin to possess, from the moment he shall have the will to exercise

for himself the power, which until then he had exercised only for another person. He would begin to possess, in effect, if he, for whom he detained the thing, consented to cede his rights to him. But if the detainer wills to take the place of the possessor, without the knowledge of the latter, the Roman laws expressly repel him, and decide, that a simple resolution to possess, taken by the detainer, does not suffice to change the possession, at least, in the case of immovables. They require, that this resolution should be manifested, and that the person for whom the possession is held should have knowledge of it. This accords with the principle, that, during our absence, we cannot lose the possession of immovable things occupied by another.

In the case of movable things, the will alone to possess for one's self does not give the possession to him who detained for another. It is at least necessary, that this will should be manifested in an unequivocal manner, by the act denominated *contrectatio*, that is, by an express subtraction of the object, such as takes place in the case of theft.

The latter principle is a consequence of another principle, relative to possession, which the jurisconsults frequently repeat, viz.: *nemo sibi ipse causam possessionis mutare potest*; the meaning of which is, that something more than the mere naked will of the detainer is necessary, in order to enable him, after having detained a thing for another, to commence the possession of it for himself.¹

The laws therefore require, that the unfaithfulness of the detainer should be manifested by a *furtum*, before it can have the effect to deprive the true possessor of his possession: in the same manner, as in the case of immovable things, they require that the unfaithfulness of the detainer should come to the knowledge of the possessor.²

It is proper to observe, that the detainer may sometimes

¹ L. 33, § 1, D. 41, 3. Savigny, pp. 56-60, gives the explanation of this rule.

² Savigny, p. 388.

refuse to the possessor the right of disposing of his thing, without willing to become himself the possessor of it: as, for example, where the *indirect* possessor refuses to reimburse to the detainer the expenses incurred by him in the preservation of the thing, the latter may retain the detention, without intending nevertheless to take it away from his adversary.¹

Second case. In regard to the question, in what manner, the act or the will of the detainer can deprive us of the possession, without acquiring it for himself, the Roman jurists establish several distinctions.

In the first place, it is certain, that the possession, which we have by another, is taken away from us, whenever we consent to an act, which, if we possessed by ourselves, would cause us to lose it: as, for example, where the detainer sells the ground which he occupies, and transmits it to the buyer. If the proprietor has knowledge of this alienation, and does not assert his right against the new acquirer, he loses his possession; precisely, as when one during our absence seizes upon our property, and, being fully informed of the invasion, we do not seek to disturb him in his enjoyment.

In regard to other cases, it is necessary to inquire, whether the loss of the detention does or does not depend upon the will of the substitute, that is, the person who possessed for another.

The expulsion (*dejectio*) of the substitute deprives the true possessor of his possession, even before the latter has knowledge of the event; and, on the other hand, we continue to possess, even when our detainer becomes insane or dies.²

¹ L. 20, D. h. t.; l. 12 in f. D. 43, 16.

² L. 1, § 22, D. 43, 16; l. 25, § 1, D. h. t.; and l. 60, § 1, D. 19, 2. There is no distinction, in this respect, between things movable and immovable.

The difference between these two cases is, that, in the first, the possessor can no longer exercise any power over the thing, whilst, in the latter, there is no obstacle against such exercise. The loss of the detention depends upon the will of the detainer, when he abandons the thing, or fraudulently transmits the possession of it to another. Does such abandonment or fraudulent transmission operate to deprive the true possessor of his possession?

It seems, that the ancient juriconsults were not agreed, in regard to the effect of such a fraud. We find, however, in the digest,¹ that the simple abandonment of the detainer does not deprive the proprietor of his possession.

In the case where the detainer fraudulently transmits the possession to another, without the true possessor being informed of it, the latter loses his possession, according to the opinion of a majority of the juriconsults.²

Justinian puts an end to the question, by deciding that the unfaithfulness of the detainer cannot, in any case, do an injury to the true possessor, and that the latter continues to possess, until he loses the possession, conformably to the principles above-mentioned.³

ARTICLE THIRD.—OF POSSESSORY INTERDICTS.

§ 1. *General Notion of Interdicts.*

The preservation of possession, under the Roman legislation, was protected and guaranteed by the *Interdicts*, which the prætor rendered. The subject of possession, therefore,

¹ L. 3, § 8, and l. 44, § 2, D. h. t.; l. 31, D. 4, 3. Some traces of the contrary opinion are discoverable in the law 40, § 1, D. h. t.

² L. 40, § 1, and l. 44, § 2, D. h. t.; L. 33, § 4, D. 41, 3. The law 3, §§ 6-9, D. h. t., furnishes an argument *a contrario* against this opinion. See also the subtle discussion of our author, pp. 393-397.

³ This decision is contained in the law 12, Cod., h. t. which is explained and developed by Savigny, pp. 399-402.

cannot be treated, without speaking of interdicts, of the actions to which they gave rise, and of the differences, which exist between these actions and those to which the name of actions more specially belongs.

The greater number of jurisconsults, without excepting even Cujas, Sigonius and Vinnius, had a false idea of these interdicts, and entertained vague and erroneous notions, concerning the procedure followed in the possessory actions. Few authors have understood the true character of these proceedings. We shall, however, feel disposed to pardon the almost inevitable errors, into which they fell, when we consider the silence, in relation to these matters, of all the monuments of the Roman law, to which those authors had access. The recent discovery of the Institutes of Gaius has supplied these deficiencies.¹

In order to avoid an enumeration, which must necessarily be long and tiresome, of the authors who have treated of this matter, we shall only say, with Savigny,² that Haubold (whom he follows in this part of his work) may be regarded as the most exact and the best guide, in this as yet obscure and little-known subject.

We begin by recalling here the ordinary progress of civil procedure in Rome. The magistrate, who had jurisdiction of the case, named a *judex*, if the facts were contested (*judicium ordinabat* or *dabat*); if, on the contrary, they were apparent by their nature, or by the acknowledgment of the parties, he himself decided definitively the contesta-

¹ It was the detached folio, in which the subject of interdicts is treated, which led Niebuhr, in the year 1816, to the discovery of Gaius.

² See the treatise referred to in the *Journal of Historical Jurisprudence*, vol. iii. pp. 358-388. The system of Haubold has been adopted by Dupont (now a professor of law in the University of Liege), in his *Disquisitiones in lib. IV. Gaii*; Lud. Batav. 1821; in 8o. p. 153.

tion, referred the demand, or decreed execution (*extra ordinem cognoscebat* ; *judicium extraordinarium*).¹

The procedure, in the case of interdicts, differed in this respect, from that of the ordinary actions. The magistrate did not prepare a *judicium* properly so called ; but, after having heard the demander, he rendered a decree, which imposed upon the defender an obligation, to abstain from doing certain acts, or to do certain things ; as is manifest from the expressions used in these interdicts : *vim fieri veto, restituas, exhibeas*.² The decree being thus rendered, either the defender acknowledged the justice of it, and performed what it prescribed, without reclamation, and there the litigation terminated ;³ or, it happened, on the contrary, either that the defender opposed the decree, by contesting the facts upon which it was founded ; or, at the same time that he complied with it, presented objections against its justice ; or, finally, that the demander pretended that the decree had not been performed ;⁴ the contestation was then submitted to the ordinary procedure ; and a *judex* (or *arbiter*) was demanded, to decide whether the demander had a right to solicit the decree in question,—whether the defender came within the case of the interdict, or whether he had performed the obligations, which it imposed upon him.⁵

Savigny does not occupy himself with the details of this procedure. We shall say something of it, in order that we may omit nothing, in reference to the subject of interdicts.

¹ See L. 3, §§ 1 and 2 ; l. 5, § 10, D. 39, 1 ; Tac. Ann. xi. 6 ; Paul, II. § 5.

² See the text in the Digest ; Gaius says of the Prætor, *principaliter auctoritatem præponit finiendis controversiis* ; iv. § 138.

³ L. 6, § 2, D. 42, 2.

⁴ Gaius, iv. § 141. It results from the oration of Cicero, *pro Cæciliæ*, csp. 8, in *f.*, and csp. 19, that he, against whom the interdict was brought, ought always to make a show of submitting to it, even when he formed an opposition against it ; he said then that he submitted himself so far as he ought to do in law.

⁵ L. 1, § 1, D. 43, 5 ; l. 6, § 2 D. 42, 2.

The litigation was pursued in two modes: either *per formulam arbitriariam*, or *per sponsionem*. In the first case, an arbitrator was named, who judged according to equity, and determined the condemnations according to his conscience. In the other, the parties themselves rigorously defined the object of the contestation, and limited the demand (*per sponsionem et restipulationem*); then, if it was desired to follow rigorously the forms of the civil law (*judicium legitimum*) a *judez* was named; or, when more prompt decision was desired, *arbitrators* chosen among the people were appointed, who, under the name of *recuperatores*, decided the question.¹

If the sentence was in favor of the demander, he pursued the execution of it by means of what Gaius calls a *judicium secutorium*, which was a new procedure, by which the obligations of the party condemned were determined.² There might intervene also divers incidental proceedings, which it would be superfluous to speak of in this place.³

The division of interdicts, into prohibitory, restitutory, and exhibitory, was important in regard to the procedure: in the first, the proceeding was always *per sponsionem*; in the others, *per formulam arbitriariam* or *per sponsionem*, at the election of the parties.⁴

The object of all contestations, in which it was necessary to have recourse to interdicts, was the repression of acts of violence or means of fact.⁵ The actions, which were the

¹ We adopt here the opinion of Mr. Dupont, in regard to the difference between *judicia legitima*, and *quæ imperio continentur*. See Dupont's Dissertations, pp. 145-153.

² Gaius, iv. §§ 165-166.

³ Gaius, loc. cit. § 167.

⁴ Gaius, iv. 141.

⁵ The term *voies de fait*, which is here translated *means of fact* is easier explained than translated. The following is the explanation given by Rondonneau. "*Voie de fait*. In its ordinary acceptation, the way (or means) of fact is an act, by which one exercises, of his own private authority, pretensions or rights, contrary to the pretensions or rights of others." ED. JUX.

result of them, arose therefore from a wrong (*ex delicto*); and they had in view to relieve the complainant from being any longer exposed to means of fact, or to a re-establishment of things in the situation in which they were before the acts of violence (*ne vis fiat, aut restituatur quod vi factum est*). This consideration is important to a knowledge of the nature of interdicts, which may be regarded as *decrees rendered to repress acts of violence*. We shall see hereafter the application of this consideration.

§ 2. Of Possessory Interdicts.¹

The authors are not only deceived, as has been already remarked in a preceding section, concerning the character of interdicts in general: but they have fallen into yet more important errors, in regard to possessory interdicts in particular. These interdicts are ordinarily divided into three classes, viz.: 1. Those, which have for their end the acquisition of possession (*interdicta adipiscendæ possessionis*); 2. Those, which tend to its preservation (*retinendæ possessionis*); and 3. Those, which are brought for its recovery (*recuperandæ possessionis*). They are generally regarded as provisory revendications, introduced to prepare or facilitate the decision of petitory actions,² and, during the pendency of the suit, to establish a state of things, to be definitively settled by those actions.

These ideas, though generally prevalent, are not at all confirmed by a sound interpretation of the Roman law.³ We must not content ourselves with saying, that interdicts are actions, the object of which is the possession:

¹ Savigny, pp. 410-426.

² Gaius speaks in this sense of the interdict *uti possidetis*, § 148; but he only means to indicate one case, in which this interdict may take place.

³ They have, nevertheless, given birth to the defective system contained in the French Code of Procedure.

for, in some respects, almost all actions, as well personal as real, have that object, and many of them have no other object; yet no person thinks of confounding them with possessory interdicts.

The interdicts, which may be considered as possessory actions, not only have the possession for their end, but also for their foundation. He, who is in actual possession, by means which the law does not condemn (at least *in regard to his adversary*), is entitled to obtain these interdicts of the prætor. They serve, either to maintain him in the possession, against every act of violence, committed by those who seek to disturb him in it, or to re-establish him in the possession, when he has been deprived of it. It is therefore, the *jus possessionis*, which is the foundation of these interdicts.

From this definition, it results, that the interdicts *adipiscendæ possessionis* are not possessory actions, he who prosecutes them not being the possessor, but having only the right to enter into possession.

The division, of which we have spoken, into three classes of interdicts, is therefore more comprehensive than is supposed. It embraces all the interdicts *concerning private interests (quæ familiarem spectant)*.¹

He who means to sue for an interdict truly possessory, must prove, that he was in possession, when the aggression took place; and this is the only thing, which it is incumbent upon him to prove.²

The opinion of those, who regard possessory interdicts as provisory revendications, is equally destitute of foundation.

¹ Savigny, p. 421; Gaius, § 143; § 2, I, h. t.; l. 2, § 3, D. 13, 1.

² Thus, the *title* to possession does not come in question in interdicts; neither are they actions for damages and interests, at least, so long as it is possible to attain their end, by the preservation or recovery of possession.

Without doubt, the interdict may be resorted to, as preparatory to the revendication of some object; for it is sometimes necessary to adjudge the possession, during the pendency of a process, which could be done by the granting of an interdict; but there are a multitude of other cases, in which the possessory action is resorted to, to repress disturbances in the enjoyment of the object. The end of interdicts is to prevent means of fact and acts of violence, as is proved by the expressions of the edict, *ne vis fiat, &c.* If these actions were nothing more than provisory revendications, they would rest upon the presumption of property; yet these interdicts are accorded to persons, who are acknowledged not to be the proprietors, but who have the possession.¹ Besides, in order to regulate the possession provisorily, during the course of a process relative to the property, the Romans had other means, viz.: the *manuum consertio*, or *deductio quæ moribus fit*;² and, on the other hand, he, who had begun to revendicate the property, might always, according to Ulpian, have the interdict *uti possidetis*.³

§ III. Of the Interdicts RETINENDÆ POSSESSIONIS.

There are three grounds, upon which the interdict tending to preserve the possession may be granted by the prætor, viz.: when the possessor has been disturbed or molested,—when he has reason to fear some disturbance,—or, lastly, when the possession is demanded, during the pendency of a process, relating to the property.⁴

¹ Savigny, p. 420.

² Aulus Gellius, 20, 10; Gaius, iv. 16; Cicero, *pro Cæcinnâ*; 5, 7, 8; *pro Tullio*, 12, 15, 16; Savigny, p. 422.

³ L. 12, § 1, Dig. 41. 2. *Nihil commune habet proprietas cum possessione; et ideo non denegatur ei INTERDICTUM UTI POSSIDETIS, qui capit rem vindicare: non enim videtur possessioni renuntiassæ, qui rem vindicavit.*

⁴ Theophilus indicates these different grounds, *ad pr. Inst. h. t.*

The end of these interdicts is to maintain the demander in his possession. If the means of fact on the part of the aggressor have occasioned him any damages, the demander has a right to be indemnified; and he may also, if need be, demand a surety for the free exercise of his possession.

But in order that such an interdict may be granted, it is necessary, that there should be: 1. A true possession; 2. Means of fact against the possessor; and 3. That these acts of violence should not have put an end to the possession.¹

These interdicts constitute *judicia duplicia* (similar to certain qualified *mixt* actions) on account of the exceptions which they allowed of to defenders. In the Roman law, the *judicium duplex* is a process, which may terminate in the condemnation of the demander. In general, the demander is only subject to be defeated in his suit, in which case, the defender must be absolved (*judicium simplex*). But there are some cases, in which the defender, not confining himself to answering the claims of the demander, at the same time commences an action against him; and it may then happen that the latter is condemned; as, for example, in the interdicts of which we are now treating, when the defender proves, that, *in respect to him*, the demander possesses unjustly, the judge cannot simply permit the defender to disturb the demander, but he must condemn the latter to restore the possession, which he has unjustly acquired; the resistance of the defender is therefore equivalent, in this case, to the demand of an interdict *recuperandæ possessionis*.² In such a case, therefore, each of the parties might have made his claim, in the quality of a demander; and hence the expression *duplex judicium*.

The interdict *retinendæ possessionis*, if it concerns an

¹ The glossators make the distinction of *vis inquietativa* and *vis repulsiva*. The former was the foundation of the interdicts now under consideration.

² Savigny, p. 370.

immovable thing, is called, from the first words of the edict, *interdictum UTI POSSIDETIS*; and when it relates to movables, *UTRUBL*.

We proceed to analyze both these kinds of edicts.

A. In the case of the interdict *uti possidetis*,¹ the edict of the prætor was thus conceived:

*Uti eas aedes (eum fundum*² according to Festus) *quibus de agitur, ALTER AB ALTERO, nec vi, nec clam, nec precario possidetis, quominus ita possideatis vim fieri veto.*

The object of this edict is to maintain the possessor of an immovable thing, against all those whom he has not deprived of the possession by violence or clandestinely, or from whom he does not hold it precariously.³

Two things in this interdict require our special attention.

1. The words *uti possidetis* indicate clearly, that the possessor must be so, at the moment of the commencement of the process.

2. The edict says: *alter ab altero*; every possessor is therefore maintained, when his possession is not defective in regard to his adversary, even though it is so in regard to a third person. This principle accords perfectly with another rule, that one cannot derive an exception from the right of a third person: *ex jure tertii non datur exceptio*. Thus, in a possessory action against Peter, I am not entitled to prevail, on the ground, that he is in possession by means of an act of violence exercised against Paul.⁴

These words are omitted in the French code of procedure, as well as in many of the customs of France, and, taking

¹ See § 4, I. h. t.; D. 43, 17; C. 8, 6; Savigny, p. 438.

² The law 1, § 1, says that this interdict concerns *omnes res soli*.

³ We shall show, that the precarious possession of the Romans is entirely different from the possession *à titre précaire* of the French law.

⁴ L. 1, § 9, D. h. t.; l. 2, Ibid.; § 4. I. h. t.; l. 17, D. 43, 26; l. 53, D. 41, 2.

art. 23 of the former in its literal sense, it might be maintained, that every body has the right to disturb one, whose possession is defective in regard to a third person. Pothier observes,¹ that these words were rejected as superfluous, in the new compilation of the custom of Orleans, and that they ought to be understood.

The interdict *uti possidetis* cannot be obtained, after the lapse of a year from the time of the disturbance of possession.² The wrong-doer might however be prosecuted, to the extent of the benefit, which he had derived from his wrongful act.³

B. In the interdict *utrubi*, the prætor expressed himself thus:

Utrubi hic homo, quo de agitur, majore parte hujusce anni fuit quominus is eum ducat, vim fieri veto.

To entitle one to this interdict, the prætor required:⁴

1. A real possession; 2. That the object should have been possessed by the demander, during the greater part of the year; but he might add to his possession the time during which the object had been possessed by him, from whom he held it;⁵ and 3. That it should have been seized by acts of violence.

The interpreters are at issue upon the question, whether it was always requisite, that the demander should be in possession, at the moment when the litigation commenced; this point has been decided in the affirmative by Justinian, who requires the same conditions for the interdicts *utrubi* and *uti possidetis*; but Savigny is of opinion (since the fourth edition of his work) that it was otherwise in the ancient Roman legislation. He proves, that the passages cited in favor of

¹ *Traité de la Possession*, No. 96.

² L. 1, pr., D. h. t. *Interdictum annale est.*

³ L. 4, D. 43, 1.

⁴ See § 4 I, h. t.; D. 43, 31; Cod. Theod., 4, 23.

⁵ Gaius, IV., § 151.

the contrary opinion are not at all conclusive;¹ and he founds himself principally upon the testimony of Theophilus, who mentions a judgment, which could not have taken place, if possession at the moment of the process had been necessary to authorize the interdict.*

There is ground to believe, therefore, that this interdict was also, according to the ancient law, *recuperandæ possessionis*.

Still, and this is an objection to the system of Savigny, it is always placed among those, which the jurisconsults call *retinendæ possessionis*. May it not be, that he, who had possessed during the greater part of a year, was, by a legal fiction, considered as the possessor, even after having lost the possession by the acts of violence, of which he complains?³

The exceptions against the interdict *utrubi* are the same with those, which may be taken against the interdict *uti possidetis*;⁴ and those authors are in error, who assert that the exceptions *vi*, *clam*, *precario*, cannot be taken against the former.

§ IV. Of the Interdicts RECUPERANDÆ POSSESSIONIS.⁵

I. When the possession had been lost by violence, it was demanded by means of the interdict *unde vi*. This interdict

¹ These passages are the l. 3., §§ 5, 12; D. 10, 4; l. 14, C. 11, 67. Savigny, pp. 454-455.

² Theoph. ad § 4, in fine, édit. de Reitz, p. 899. "*In interdicto UTRUBI is vincit, qui anno retro replicato, plurimo tempore possedit, veluti ego septem mensibus possedi, tu quinque posterioribus, ego vincam; jam igitur possessione mihi reddita.*"

³ Savigny, p. 455-456. This was the opinion of the learned Wieling (1733).

⁴ § 4 l. h. t.; Paulus, Rec. Sent., V. 6, § 1; Savigny, p. 455-457.

⁵ In regard to this matter, see the oration of Cicero, *pro Cæcinnæ*, with the excellent dissertation of the late Mr. Cras, Leyden, 1769, in 4to. See also, Gaius, IV. §§ 154, 155; § 6, l. 4, 15; Dig. 43, 16; Cod. 8, 4 and 5; Cod. Theod., 4, 22.

was called *de vi armata*, when the violence had been done by a combination of armed men. The interpreters err greatly, in confounding the interdict *unde vi* with the symbolical act, which was in use among the Romans, preliminary to revendications, and which was designated by the words *deductio quæ moribus fit*.¹

It is also a mistaken idea, that the interdict *unde vi*, in the first case, that is to say, when the violence is not committed by armed persons, was called the interdict *de vi festuaria*² or *de vi quotidiana*. Cicero alone makes use of this latter expression, to distinguish the degree of this kind of violence, from that which takes place, where the interdict is called *de vi armata*. Justinian, however, amalgamated the two cases, so that there is no longer but a single interdict *de vi* and *de vi armata*.

The conditions, which must concur, in order to entitle one to this interdict, are: 1. The possession of the demander, at the moment of the violence; 2. An act of violence (*atrox vis*), committed by the other party himself, or by his orders; 3. The loss of possession by this violence; for there must be an expulsion (*dejectio*); and 4. That the thing, the possession of which is in question, should be an immovable thing; though, this interdict, by a constitution of Valentinian I.³ is extended to the possession of movables.

These principles require to be further developed.

¹ The interpreters, and, in particular, the philologists, have strangely deceived themselves, in regard to the *deductio quæ moribus fit*, mentioned in the oration *pro Cæcinnæ*. We may satisfy ourselves of this, by referring to note 12, to this oration, in the edition of Cicero's Works, published by Leclerc, Paris, 1821, t. viii., p. 525,—which note is transcribed from other editions. Savigny explained this procedure in 1817, in the *Journal of Historical Jurisprudence*, t. iii., p. 421. The fragments of the oration *pro Tullio*, discovered by Mai & Peyron, throw some light on this point.

² The words *vis festuaria* are used by Aulus Gellius, to distinguish simulated from actual violence. *Noctes Att.*, 20, 10, in fine.

³ L. 7, C. 8, 4; l. 10, C. Th. h. t.

1. The opinion has been maintained, that this interdict was also accorded to him, whose possession, in regard to his adversary, was nothing more than a simple detention: and, in support of this doctrine, the law 1, § § 8 and 9, D. h. t. is relied upon, in which it is said: *Dejicitur is qui possidet sive civiliter sive naturaliter, nam et naturalis possessio ad hoc interdictum pertinet.* We have already given an interpretation of this difficult passage.¹ Savigny proves, that the words *naturaliter possidet* must be here taken to indicate the *true possession*, as contradistinguished in this passage from the *civil possession*. This results from the conclusion of the fragment, in which the interdict is refused to the former, whose possession is what is ordinarily denominated the *natural possession* or *simple detention*. Without Savigny's explanation, this passage is unintelligible; and, in fact, many of the interpreters have declared it to be inexplicable.²

Some authors also pretend, that the possession was not necessary, in order to obtain the interdict *de vi armata*, on the authority of a passage of Cicero, in his oration *pro Cæcinnâ*, which seems to say so; but this passage cannot be regarded as a proof: it is a mere assertion, thrown out by Cicero, in the course of his argument, but in which he himself had no confidence, inasmuch as he attempts notwithstanding to establish, that his client was in possession.³

2. Violence is the second condition. It must be committed against the person of the possessor, and deprive him of his possession.

It is necessary, also, that the violence should be committed by the person, against whom the interdict is demanded, or, at least, that it should be committed by his orders.⁴ The successor of the wrong-doer, by a particular

¹ Ante, 28-30.

² Savigny, p. 75.

³ Savigny, pp. 463-467.

⁴ L. 1, § § 12-15; l. 3, § § 10-12, D. h. t.

title, is not subject to this interdict, even though he had knowledge of the violence committed by his grantor. The heir is responsible only to the extent of the advantage, which he derives from the wrongful act.¹

3. The possessor must be expelled (the term *depicere* is ancient—Cicero makes use also of the word *detrudere*, which was primitively employed in the edict of the prætor). The immediate cause of the loss of possession must be the employment of some violence, either physical, or moral, as, for instance, the threat of great and imminent danger. One, who, in attempting to re-enter upon his ground, is violently prevented, is also entitled to this interdict.²

But he, who only quits his possession, from the fear of remote dangers, cannot be considered as expelled, and is not entitled to the interdict, against him who occupies the abandoned estate.³ The interdict is not demandable, when the possessor himself delivers the thing, though he is compelled to do so by violence; in which case, the appropriate remedy is by the action *quod metus causa*.⁴ When one, who is expelled by violence, immediately retakes possession by force, he is considered as never having lost it; and, therefore, the interdict cannot be brought against him.⁵ A remarkable consequence of this rule is, that an absent person, whose possession is occupied by a stranger, and who retakes it by force, immediately after having knowledge of the occupation, cannot be prosecuted by the interdict *unde vi*: for he is considered as never having lost the possession.⁶

¹ L. 3, § 10, D. 43, 17; l. 1, 48; l. 2, D. h. t.

² L. 3, § 8, D. h. t. Such was the case, in which Cicero pleaded for Cæcinnæ. See particularly chap. 13, of that oration.

³ L. 9, D. 4, 2.

⁴ L. 5, D. h. t.

⁵ L. 17, D. h. t.; l. 3, § 9, D. lb.

⁶ This is explained by the principles relating to the loss of possession, p. 261.

4. We ought also to speak of the extension of this interdict to movable things. Anciently, the possession of movables was guaranteed by other means, viz.: by the actions *vi bonorum raptorum*, *furti*, *ad exhibendum*, which were made use of, according to the diversity of cases, and sometimes also by the interdict *utrubi*.

But since the legislative disposition of Valentinian I. declaring, that he, who makes use of force to seize upon an object, whether movable or immovable, ought to restore it, and lose the property, if it belonged to him, or pay the value of it, the interdict of which we are speaking was extended to movables, as is proved by the code and institutes, which contain this constitution.¹ In this part of his work, Savigny refutes an opinion relative to this constitution, advanced by Thibaut, and which is founded upon a different manner of regarding interdicts in general. Thibaut, in common with the practitioners, considers them as actions, which constitute the object of a summary procedure: a hypothesis, which is contrary to the history of this part of the law.²

Having made these observations, concerning the conditions, requisite to the support of the interdict *unde vi*, it remains for us to speak briefly of its effects, and of the exceptions, which may be opposed to it.

The principal effect of this interdict is a restitution of the possession: if the object has perished, the value of it must be paid; if damages have been caused by the acts of violence, either to the object itself, or relative to its accessories, the person injured must be indemnified; the restitution of the fruits is a natural obligation.³

¹ § 1, I. 4, 2; l. 7, C. h. t.; § 6, l. 4, 15.

² Thibaut's article is inserted in the *Archives for the Practice of the Civil Law*, t. i. pp. 105-111 (1818), and the refutation is contained in Savigny's work, pp. 487-481.

³ See L. §§ 34-42, and l. 15-19, D. h. t.; l. C. 4, lb. Savigny, pp. 487-60-415.

The question presents itself here, whether an indemnification is due, where prescription has been interrupted by the expulsion. The affirmative must be adopted; or at least it may be said, that one may require a surety for the indemnification, due in case of an interruption of the new prescription by the true proprietor of the thing, after the expiration of the legal time of the first.¹

The exceptions *vi*, *clam*, or *precario*, which lie against interdicts *retinendæ possessionis*, are not allowed here. Anciently, they were authorized in cases of simple violence, but not in the interdict *de vi armata*.² Justinian rejects these exceptions³ in all cases; but some traces of the ancient law are still to be found in the digest.⁴

This interdict must be resorted to within the year.⁵ The exception *pacti conventi* is not admissible, if the pact was made before the wrong committed; but after the wrong, the interdict may be renounced.⁶

II. *De clandestina possessione*. In the ancient Roman law, there existed an interdict against him, who had clandestinely seized upon the possession of an immovable thing.⁷ In regard to movable things, other actions might be resorted to. There is but a single text, which makes mention of this interdict, viz.: the law 7, § 5, D. 10, 3,⁸ in which Ulpian states, that Julian was in favor of giving this inter-

¹ Savigny, pp. 416, 417.

² Cicero, *pro Cæcinnâ*, cc. 8, 23, 32.

³ § 6, I. h. t.

⁴ In the laws 1, § 30; l. 14, 17; l. 18, pr., D. h. t.

⁵ L. 1. pr., D. h. t.

⁶ L. 27, § 4, D. 2, 14.

⁷ Different cases of clandestine possession are mentioned in the laws 7, pr. D. 41, 2; l. 40, § 2, D. Ib. l. 4, D. 41, 10.

⁸ *Sed et si clam dicatur possidere qui provocat, dicendum esse (Julianus ait), cessare hoc iudicium (communi dividundo); nam de clandestina possessione competere interdictum inquit.* This must not be confounded with the case, in which the interdict *quod vi aut clam* may be maintained. The latter is not a possessory interdict.

dict. The titles, devoted to the matter of interdicts in the institutes and pandects, do not speak of it; and it is easy to give the reason of their silence. It has already been shown, that the possession of an immovable thing cannot be lost, by the occupation of a third person, without the knowledge of the possessor; and therefore there cannot be a clandestine possession of an immovable thing: the possession is not considered as lost, but from the moment when the possessor has knowledge of the occupation, and tolerates it; and then he is considered as having lost the possession by violence. In such a case, the party injured may have his remedy by the interdict *unde vi*.¹

The passage above referred to must be considered as historical; it perhaps contains nothing more than an opinion, which was peculiar to the juriconsult Julian; and Cujas² is therefore evidently mistaken, in admitting a particular interdict, *de clandestina possessione*, into the system of the Justinianean legislation.

III. *De precario*.³ The grant of the enjoyment of a thing (or the use of a servitude), subject to be revoked at the pleasure of the grantor, forms a contract called a *precarium*. This word is explained in different passages of the Roman juriconsults.⁴ The receiver of a thing by this title was considered, in case of doubt, as the true possessor, and the proprietor as dispossessed.

The possession of the receiver of a thing *precario* was a *just* possession, so long as it remained unrevoked; but, after a revocation, it became *unjust* or *defective*, and the detainer might be pursued by an interdict *recuperandæ possessionis*, which was denominated *de precario*.⁵

¹ This is expressly stated in the law 6, § 1, D. 41, 2.

² Cujacii, Observ. IX. c. 33. See also Savigny, p. 506.

³ See Paul, V. 6, §§ 10-12, D. 43, 26; C. 8, 9.

⁴ See Paul, loc. cit.; l. 1, pr., D. h. t.

⁵ The terms of the edict are: *Quod precario ab illo habes aut dolo malo fecisti ut desineras habere, qua de re agitur, id illi restituas.*

The conditions requisite to the granting of this interdict are: 1. The possession which the demander has obtained; and 2. The refusal to restore it to the proprietor. The foundation of the process is not the agreement to restore, but the possession unjustly withheld;¹ for an agreement, to allow the possession to another for a certain term, does not exclude the interdict. The law 12, pr. h. t. says: *Cum precario aliquid datur, si convenit ut in calendas Junias precario possideat, numquid exceptione adjuvandus est ne ante ei possessio auferatur? Sed nulla vis est hujus conventionis, ut rem alienam domino invito possidere liceat.*

This interdict was originally allowed only for the possession of immovable things;² but, in the time of the juriconsults, whose decisions are preserved in the digest, it had already been extended to the case of movables.³

It is unnecessary to go into any further details concerning this interdict; but the question arises here, why the Roman law provided a particular interdict in the case of a *precarium*?

Might not this contract be regarded as a *commodatum*, giving rise to the action *commodati*, or as a contract *do ut des*, entitling the party to an action *præscriptis verbis*?⁴

Savigny explains the origin of the *precarium* in his historical sketches concerning the origin of possession.

This interdict seems to have been introduced, in order to enable the patricians, in case of need, to take back the possession, which they had granted to their clients, in the public domains, of which they had the gratuitous enjoyment. It afterwards became very useful to a creditor, who, after having received, by *mancipatio* and without *fiducia*,

¹ See l. 14, 23, § 1, D. h. t.; l. 14, § 11, D. 47, 2.

² See Isidor. Etymol. V. 25.

³ L. 4, pr., D. 43, 26; Savigny, p. 433.

⁴ This action is allowed in a similar case, in the law 17 pr., D. 19, 5.

the property of a pledge, had given the precarious possession of it, for a moment, to his debtor; in which case, this interdict offered him a sure means of recovering the possession, whenever he pleased. This is declared expressly by the jurisconsult Paul.¹

§ V. *Changes made by the Emperors in the Matter of Possessory Interdicts.*

We have now seen, in what manner, the nature of the interdict was determined by particular texts, according to the nature of the possession, and the kind of injury which had taken place. Many jurisconsults, of whom Cujas is one, pretend, that all these distinctions were rendered useless by the constitutions of the emperors, which introduced a possessory action (*interdictum momentaneæ possessionis*) common to all the cases, in which the possession, of whatever character it might have been, had suffered any attack whatever. This change, say these authors, was not made by one or several express laws; but was brought about insensibly by usage; and the existence of the new system is already supposed, in all the laws of the code, which speak of injuries committed upon the possession, especially in the laws 5, 8, and 11, C. *unde vi*, 8, 4: in the law 12, C. *de acq. et ret. poss.*, 7, 32; and in the rubric, *si per vim vel alio modo*, &c. 8, 5.

Savigny demonstrates the incorrectness of this opinion, by showing, that in the digest and in the institutes (which contain the new as well as the anterior law), the ancient system is yet fully sanctioned; and that it is found expressly confirmed in the code, by several constitutions, and even in regard to the above cited law 11, *unde vi*, which creates a new action for a new case.

¹ Paul, Sent. Recep. V. 6, 37. See also Isid. Orig. V. 25, and, in particular, Gaius, II. § 60.

In regard to the other laws, relied upon by his opponents, Savigny¹ explains them in such a manner as to confirm his opinion, and thus destroys all the foundations of the opposite doctrine.

The mode of proceeding, however, in the matter of possession, underwent great changes, in consequence of the new organization, given to the judiciary power, under Diocletian or Constantine, and of the modifications, which were then made in the whole civil procedure. The union of the functions of the magistrate with those of the *judex*, was either the cause or the effect of the suppression of the *formulas*. The magistrate, whose ordinary functions were formerly confined to the presentation of questions of fact and the determination of their legal effect, or, at least, of the nature of the condemnations resulting from a verification of the facts, was authorized himself to finish the investigation and to render the sentence. All judgments were consequently qualified *judicia extraordinaria*, and interdicts were confounded with other actions; the decree, which the prætor rendered, before the possessory litigation, that is to say, the interdict properly so called, became from thenceforward useless. Thus Justinian, in his institutes, after having said *superest ut dispiciamus de interdictis*, adds, *seu extraordinariis actionibus quæ pro his exercentur*; and, in § 8, of the same title, he says expressly: *hodie non est necesse reddi interdictum, sed perinde judicatur sine interdictis, atque si utilis actio ex causa interdicti reddita fuisset*.

§ VI. Of Interdicts relative to quasi-possession.*

There were also interdicts destined to guarantee the quasi-possession. He, who was disturbed by acts of violence, in the enjoyment of a servitude or other similar right,

¹ Savigny, pp. 400-404.

* Savigny, p. 534, et seq.

might have a possessory action. This kind of possession must be divided, for the purpose of this examination, into :

- A. The possession of personal servitudes ;
- B. The possession of real servitudes ; and
- C. The possession of a superficies.

A. The possession of an usufruct or a right of use naturally entitles the possessor to a possessory action, against one who disturbs him in his enjoyment ; for this quasi-possession has almost all the characteristics of the true possession. Like the latter, it embraces the totality of the thing. If it differs from the real possession, it is only in the extent of the right, which the possessor attributes to himself, and which is generally supposed to belong to him. This quasi-possession also is acquired by the delivery of the object, when it is received, not with an intention to have the thing itself, but only the right of usufruct or use.¹ It is lost, when any act whatever renders the exercise of the right impossible, or when the possessor voluntarily renounces it.²

In the same manner, that the true possession may be held by another, so also, in regard to the quasi-possession, it is immaterial whether the possessor exercises the right of usufruct or use in his own person, or by a representative ; the sale even of a usufruct is considered only as the substitution of one person for another, in the enjoyment of the right ; the right itself is inalienable.³

The interdicts, to which the true possessor, that is to say, one who possesses *animo domini*, is entitled, are therefore in like manner granted to him, who possesses as usufructuary. Thus he may obtain :

¹ L. 3, pr., D., 7, 1: *Dare autem intelligitur, si induxerit in fundum legatarium, cum eo patiatur uti frui.*

² It is a remarkable fact in relation to this matter, that non-user does not put an end to the quasi-possession ; it is considered as merely suspended. Savigny, pp. 537-538.

³ L. 12, § 2, D., 7, 1.

1. The interdict *uti possidetis*, when the quasi-possession relative to an immovable thing is not entirely destroyed, but only disturbed, no matter by whom,¹ or how, as, for example, where the right of the quasi-possessor is contested;

2. The interdict *utrubi* in regard to movables;

3. The interdict *unde vi*, where the usufructuary is dispossessed of his right.² The demand will frequently be only for damages and interests for the privation of the enjoyment, as, for example, where the usufruct is extinguished during the non-enjoyment.³

4. The interdict *de precario*.⁴

B. Real servitudes are distinguishable into two classes:

1. RURAL SERVITUDES, the exercise of which consists in the doing of certain acts, to which one is entitled by the right of servitude. In respect to these, the quasi-possession commences, as soon as the acts, which they authorize, are done, with an intention to exercise the right;⁵ and this quasi-possession is lost, in the same manner, with that of personal servitudes. It may also take place, by the intervention of another, the acts which constitute it being always exercised *fundi nomine*, that is, for the service and on account of the dominant estate.⁶

The Roman law allows here of special interdicts, for the most ordinary cases: it does not establish general possessory actions, but only particular actions. The distinction, between interdicts *retinendæ* and *recuperandæ possessionis*, is not admitted, in relation to this quasi-possession, and indeed seems to be impossible.

¹ L. 4, D., 43, 17.

² L. 3, § 13, 14 and 16, D., 43, 16.

³ L. 9, § 1, D., 43, 16.

⁴ L. 12, § 2, D., 7, 15; l. 2, pr. D., 43, 26.

⁵ L. 25, D., 8, 6; l. 20, D., 8, 1; l. 7, D., 43, 19.

⁶ L. 5; l. 6, pr.; l. 20, 21, 22, 23, and 24, D., 8, 6; l. 1, § 7; l. 3, § 4, D., 43, 19.

We shall make use of another division, in order to indicate the interdicts, which concern this matter, viz. :

1. In regard to servitudes which concern ways.

(a) *De itinere actuque privato*.¹ Those who have exercised the right of *iter* or of *actus*, are entitled to this interdict, which, in relation to its effects and to the exceptions which accompany it, resolves itself into the interdict *uti possidetis*. The servitude must have been exercised, for the space of thirty days at least, within the year preceding the act, on account of which the interdict is claimed; but in order to make out the thirty days, the demander may reckon the possession of his predecessor with his own;² and, provided the right has been regularly exercised, during the thirty days, it is of no consequence, that, previously and even within the year, the possession has been precarious, violent, or clandestine.

(b) *De via reficienda*.³ This interdict is intended for the protection of one, who wishes to repair the road, upon which he is entitled to a right of way. The possessor is bound to prove his right.⁴

2. In regard to water courses.

(a) *De aqua quotidiana et aestiva*.⁵ This interdict was originally applicable only to courses established in fields, for the purposes of agriculture; but, afterwards, it was extended to all aqueducts, without distinction.⁶ It is granted only to one, who has exercised the *jus aquæ ducendæ*, in good faith,⁷ during the year preceding, or, where the use of the water is not continual, but only for the summer or winter, during the eighteen months preceding.⁸ This in-

¹ D., 43, 19.

² L. 1, § 2, 3, 5, 6, 7, 8, 9, and 10, D., eod.

³ L. 3, § 11, D., 43, 19.

⁴ L. 3, § 13, D., eod.; Savigny, pp. 462, 463.

⁵ D. 43, 20.

⁶ L. 1, § 11, 13 and 14; l. 3, pr. D. eod.

⁷ This condition is expressly required by the l. 1, § 10, 19, D. eodem.

⁸ L. 1 §§ 31-36; l. 6, D. eod.

terdict is also one of those, whose effects are to be determined by analogy to those of the interdict *uti possidetis*.¹

(b) *De rivis*.² This interdict has the same characteristics as the interdict *de via reficienda*.

3. In regard to the right of drawing water, the interdict *de fonte* is provided.³

II. CITY SERVITUDES, which are subdivided into positive, as *oneris ferendi, tigni immittendi, &c.*, or negative, as *altius non tollendi*.

The possession of the first commences by the fact of a construction, proper for the exercise of the servitude; and this possession is preserved, by the possession of the estate on which the construction is built.⁴

In regard to the possession of negative servitudes, it is more difficult to determine their commencement. It would seem natural, at the first view, that one should be considered to commence the possession of these servitudes, as soon as the proprietor of the serving estate abstains from all acts, contrary to their exercise; but, it would result from this principle, that, in order not to suffer the commencement of such a possession, and to preserve the freedom of their estates, proprietors would be under the necessity of making continual changes in them, which would be absurd.

It is certain, however, that there is a possession of a negative servitude, when the owner of the serving ground, having undertaken to do what the servitude prohibits, is prevented by the other party, and yields to the obstacle.⁵ On this ground, several of the interpreters pretend, that a simulated opposition and adhesion were always necessary, for the establishment of negative servitudes; but this

¹ Savigny, pp. 464, 465.

² D. 43, 21.

³ D. 43, 22.

⁴ Servitudes, quæ in superficie consistunt, possessione fundi retinentur. L. 20, D. 8, 2.

⁵ L. 15, D. 39, 1; l. 45, D. 39, 2.

theory is not less foreign to the Roman laws, than to the ancient juriconsults; and there is no trace to be found, either in the first, or among the second, of these fictitious acts.

According to Savigny, one may also acquire the possession of negative servitudes, by the sole effect of the title, in which the owner of the serving ground declares, that he renounces the doing, upon his own property, of what is contrary to the servitude, which he acknowledges or accords to his neighbor.

The possession of these servitudes is lost, as soon as there exists, on the serving estate, a construction, plantation, or any other work whatever, which prevents the dominant estate from deriving the benefit of the servitude.

The interdict *uti possidetis* is the general means for the guarantee of the possession of city servitudes.¹ The prætor gives but a single special interdict, that *de cloacis*. The interdict *unde vi* would be superfluous; for, in city servitudes, as in rural servitudes, the case of disturbance is resolved into that of expulsion.

C. The right denominated *superficies* is not to be considered either as a property or as a servitude. The prætor maintained him, who was entitled to the exercise of this right, by a special interdict *de superficibus*,² and even by an action, against the proprietor of the ground, as well as against every other person. A superficiary, who was dispossessed by an act of violence, was entitled to the interdict *unde vi*.³ The interdict *de precario* was also sometimes resorted to.

Here terminates the matter of *possessory interdicts*. Savigny does not treat of others, because they have no direct relation to possession, which makes the object of his treatise.

¹ L. 8, § 5, D. 8, 5.

² D. 43, 18.

³ L. 1, § 5, D. 43, 16. Savigny, pp. 557-560.

We shall say but a single word of the *sixth* chapter of the work. The author, in that chapter, explains the changes introduced into the system of the Roman law concerning possession and interdicts, by the canon law, by the jurisprudence of the middle ages, and by the laws of the Germanic empire. The principles, which he developes, might contribute much to make known the nature of possessory actions, in the ancient French jurisprudence; but this subject would require researches, which it is impossible to make, at this time.

An erroneous interpretation of the false decretal *redintegranda* considerably modified, in practice, the nature of the possessory action *unde vi*, which received the name of *actio spoli* (*la réintégrande*). The exercise of any right whatever was also considered as a possession.¹

During the middle ages, a period when the Roman law was only misapplied,—the practitioners introduced into the system of possessory actions, the *summariissimum*, by means of which the possession was provisorily regulated, with a right to have recourse afterwards to the interdict *uti possidetis*, under the name of *summarium*.

In divers countries, and especially in Germany, this change was admitted as a means of abridging and simplifying the legal system; but, instead of attaining that end, it has only rendered the procedure still longer and more difficult. This innovation, besides, has entirely deprived the judges of those certain rules, by which they were formerly guided, and has left them at liberty to follow their own discretion. Such, in our opinion, is the result of the French code of civil procedure.

L. S. C.

¹ The French civil code, art. 2226, seems to sanction the same system, without however admitting its consequences.

ART. II.—ON THE ORIGIN AND VARIOUS KINDS OF DOWER.

DOWER is the provision made by the law, upon the death of the husband, for the support of the wife out of his estate, during her life. It is that estate for life derived from the law, which a widow acquires in a certain portion of her husband's real property, after his death, for her support and maintenance.¹ All the various definitions given by modern jurists are based upon Littleton's description of tenancy in dower: "Tenancy in dower is, where a man is seised of certain lands or tenements in fee-simple, fee-tail general, or as heir in special tail, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty, by metes and bounds for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old at the time of the decease of her husband, otherwise she shall not be endowed."²

Dos, dower, in the common law, is taken for that portion of lands or tenements, which the wife hath for term of her life of the lands or tenements of her husband, after his decease, for the sustenance of herself, and the nurture and education of her children.³

Dos is derived, according to Lord Coke, *ex donatione et est quasi donarium*, because either the law itself doth

¹ Cruise's Dig. tit. vi, chap. 1, § 1.

² Litt. § 36.

³ Co. Litt. 36.

(without any gift) or the husband himself giveth it to her. In Domesday, *dos* is called *maritagium*.¹ But *maritagium* as used by Glanville, answered to the *dos* of the Romans, and signified the portion which a man gave with his daughter in marriage.² *Dos* is also deduced from the French *douaire*.³

Dower is called in Latin by the foreign jurists, *doarium*, but by Bracton and English writers, *dos*. By the common law of England, *dos* or dower is the third part which the woman hath of her husband's lands after his decease, and is not taken for the money or land which the wife bringeth in marriage; for then it is called either marriage portion, or land given in marriage.⁴ By the Roman law, *dos* signified the marriage portion which the wife brought to her husband; if given by the father of the woman or some of that line, it was called *dos profectitia*; if brought by the wife herself, or given to her by her mother, or by some other, it was denominated *dos adventitia*;⁵ as a security for the marriage portion which a wife brought to her husband, the *donatio propter nuptias* was introduced by Justinian.⁶ The condition annexed to a gift, by reason of marriage, was, that as the portion (by a fiction of law) was to remain with the husband, so this gift was to remain with the wife. Yet she had not the growing interest or profits of it, as the husband had of her portion; for he alone was to undergo the extraordinary charge which the marriage brought with it. The interest that the wife had in such a gift was no farther than to keep it as a security, that her portion should be returned if the marriage were dissolved; not but that his whole estate was liable to answer for it; but in this

¹ Co. Litt. 36.

² Crabb's Hist. of Eng. Law, p. 85.

³ Spelman's Gloss. ad vocem.

⁴ 1 Inst. 31, a.

⁵ Wood's Inst. of the Civil Law, 174; 1 Brown's Civil Law, 267.

⁶ Ayliff's Civil Law, 333; Just. Inst. Lib. ii, tit. 7, § 3.

method there was a more direct security.¹ The portions of women were protected and favored by the Roman law, for the encouragement of them to enter into the state of matrimony; *Reipublicæ interest mulieres dotes salvas habere propter quas nubere possunt.*² For that reason an action could be instituted for the portion on a bare promise after the marriage was solemnized.³ The kind of estate signified by the word *dos*, in the civil law, bears no resemblance to that, indicated by the word dowry, in the common law; nor, indeed, is there any thing in general more different, than the regulations of landed property, according to the English and Roman laws.⁴ The Romans knew nothing of endowing their wives. Although unknown to them, yet there is scripture authority for the use of it in the earliest ages of the world. Thus when Shechem asked Jacob for his daughter Dinah, in marriage, he said to him, "ask me never so much dowry and gift, and I will give according as ye shall say unto me: but give me the damsel to wife."⁵ The practice prevailed among the Grecians, until, by a refinement of manners, they began to look upon it as disgraceful.⁶

Dowry out of the lands seems to have been unknown in the early part of the Saxon constitution; for, in the laws of king Edmond, the wife is directed to be supported wholly out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one half of the lands, with a proviso that she remained chaste and unmarried; as is usual in copyhold dowers, or free bench.⁷ Sir Martin Wright remarks that "we find no footsteps of dowry until the time of the Normans."⁸ Professor Stearns, in his valuable treatise upon

¹ Wood's Inst. 174.² D. 23, 3, 2.³ Wood's Inst. 175.⁴ 2 Blacks. Comm. 129.⁵ Gen. 34, 12.⁶ Crabb's Hist. Eng. Law, 83.⁷ 2 Black. Com. 129.⁸ Tenures, 193.

Real Actions, says that this is a mistake; for there is an ancient Saxon charter in the appendix to the treatise on gavelkind, by Mr. Sumner, with the title of "*Chirographum pervetustum de nuptiis contrahendis, et dote constituenda*," in which particular lands, together with a certain number of oxen, cows, horses and bond men, are appropriated for the dower of the wife.¹ "Yet some have ascribed the introduction of dower to the Normans, as a branch of their local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens*, *tertia*, and *dotatium*) by the emperor Frederick II.; who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals."² Sir Matthew Hale states in his history of the common law, that amongst the laws of king Canute, in Lambard, is this law: *Sive quis incuria sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur hereoti nomine) sibi assumito verum eas judicio suo uxori, liberis et cognatione proximis juste (pro suo cuique jure) distributo*, on which Hale remarks, that the wife had a share, as well of the lands, for her dower, as of the goods.

It is generally supposed, that dower had its origin among the ancient Germans, and was brought by them into the southern parts of Europe; for as early as the time of Tacitus, it was an established custom among the German nations, that the wife should bring no portion to the husband;

¹ Stearns on Real Actions, 275.

² 2 Blacks. Comm. 129.

but that the husband should allot a part of his property for her maintenance, if she should survive him: *Dotem non uxor marito, sed uxori maritus offert.*¹ The Germans having established themselves in the southern parts of Europe, and reduced their customs into writing, fixed the portion of the husband's estate which he might allot to his wife for dower. The Longobardic code directed that it should consist of a fourth part, the Gothic of a tenth; and in process of time, regular forms were invented for the purpose of constituting dower.²

On the establishment of the feudal system, dowries became universal, but they varied in quantity in different countries. The Goths did not allow dower to exceed a tenth. The Saxons, on the continent, allowed the wife the half of what the husband acquired, besides the dower which was assigned to her at the marriage. The assizes of Jerusalem assigned a half, but the Lombards only a fourth. The Sicilians, Neapolitans, and after them the Normans and Scotch allowed a third, which corresponded with that allowed by the laws of Henry I.³

In the custom of the Germans, says Stuart, we probably have the origin of the right of dower, which was carried by the northern barbarians into their extensive conquests; and when a permanent interest was acquired in land, the dower of the widow was extended and applied to real estate, from principle and affection; and by the influence of the same generosity of sentiment which first applied it to chattels.⁴ Olaus Magnus records the same custom among the Goths; and Dr. Stuart shows it to have been incorporated into the laws of the Visigoths and Burgundians.⁵ It is the opinion

¹ Stearns on Real Actions, 274; Tacitus de Mor. Ger. 18; Cruise's Dig. tit. vi, chap. 1, § 2. ² Ib. ³ Crabb's Hist. Eng. Law, 83.

⁴ Stuart's View of Society, p. 29, 30, 223-227.

⁵ 4 Kent's Comm. 35, in note.

of Mr. Barrington, that the English would probably borrow such an institution from the Goths and Swedes, rather than from any other of the northern nations.¹

William the conqueror is not known to have made any alterations in the Anglo-Saxon custom respecting dower; and it probably continued to consist of a moiety of the husband's lands, which was forfeited by her incontinency, or in case of her second marriage. By the charter of Henry I., this condition of chastity and widowhood was only required where there was no issue.²

The law was changed in the reign of Henry II., according to Glanville, for every man was bound, both by the ecclesiastical and civil law, to endow his wife, at the time of his marriage, either by naming the dower in particular, or by endowing her generally of all his lands. If he endowed her generally, then the wife was entitled to her *dos rationalis*, which was one third of her husband's freehold. If he named a dower which amounted to more than a third, it was not allowed, but reduced to a third. Nor was the wife entitled to dower out of any of her husband's subsequent acquisitions, unless he specially engaged before the priest to endow her of them.³ These regulations are exactly

¹ Observations upon the Ancient Statutes, p. 9, 10.

² Blackstone's Law Tracts, 266.

³ *Dos duobus modis dicitur: dos enim dicitur vulgariter id, quod aliquis liber homo dat sponse suae, ad ostium ecclesiae, tempore desponsationis suae; tenetur autem unusquisque, tam jure ecclesiastico, quam jure seculari, sponsam suam dotare tempore desponsationis. Cum quis autem suam dotat, aut nominat dotem, aut non. Si non nominat, tertia pars totius tenementi liberi sui, intelligitur dos ejus, et appellatur rationalis dos cujusalibet mulieris tertia pars liberi tenementi viri, quod habuit, tempore desponsationis, ita quod fuerit inde scisitus in dominico. Si vero dotem nominat, et plus tertia parte, dos ipsa in tanta quantitate stare non poterit; amensurabitur enim, usque ad tertiam partem, quia minus tertia parte scilicet tenementi sui potest quis dare in dotem, plus autem non.* Glanville, lib. vi. c. 1.

similar to those contained in the Grand Coustumier of Normandy.¹

Nothing is mentioned in king John's Magna Charta, or the charter of 1 Henry III., respecting dower; but in the charters of 1217 and 1224, it is declared, that dower should consist of a third part of all the lands, which the husband held during his life, unless the wife had been endowed of a smaller portion at the church door: *Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui, quæ fuit sua in vita sua, nisi de minori fuerit dotata ad ostium ecclesiæ.*²

The general law of dower was very early established, as the preceding investigation abundantly proves; but its origin cannot be conclusively shown. The introduction of dower into England, said Justice Nott, is of such antiquity, that its origin cannot be traced with any degree of certainty.³ The proportion of the husband's property, to which the wife was entitled, varied according to the local customs prevailing in different districts, for *consuetudo tollit communem legem*. These customs we may have occasion to notice when enumerating the different kinds of dower.

The law was formerly such, that the necessity of making a provision for the wife, in case she survived her husband, will appear to be very obvious. The ancient law, previous to the introduction of trusts, by the statute 27 Henry VIII., did not permit the husband to give to his wife during his life; and he could not devise his lands to her until that reign. In the Roman law, all donations between a husband and wife were forbidden by a decree of the senate; the intention of that law was to prohibit simple donations, and such as proceeded from mere liberality and were made without any valuable cause. The *donatio propter nuptias* was not con-

¹ Grand. Coust. ch. 101.

² Cruise's Dig. tit. vi., ch. 1, § 7.

³ Wright v. Jennings; Bayley's S. Car. Rep. 278.

sidered as contradicting that decree; because such a donation appeared to be founded on a just cause or consideration, and was termed a remuneration, requital, or recompense for the wife's dowry or marriage portion. A simple donation between husband and wife was forbidden, lest the concord which ought to exist between them should seem to be purchased, and lest it should administer occasion for divorces and adulteries, if the person that had possessions did not bestow them on the other.¹

In England, a husband might make a testamentary disposition of his *personal* property in favor of his wife. But in the early times of the common law, the personal property, even of the most opulent, was comparatively trifling. Without a general provision, therefore, in favor of the wife, she would have been left destitute, unless she had been specially endowed in some of the ancient modes, at her marriage.²

We will now proceed to the enumeration of the kinds of dower. According to Littleton there are five kinds: dower by the common law, dower by the custom, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la plus belle*.³

1. Dower at common law has already been described.⁴

2. Dower by the custom is where a widow becomes entitled to a certain portion of her husband's lands, in consequence of some local and peculiar custom; in some places she shall have the half, and in some the whole.⁵

In cases of this kind, the wife cannot waive the provision thereby made for her, and claim dower at common law, because all customs are equally ancient with the common law.

¹ I. 2, 7, 3; Ayliff's Civil Law, 333; 1 Brown's Civil Law, 83; Wood's Civil Law, 174.

² Stearns on Real Actions, 277.

³ Litt. § 51.

⁴ Ante, page 292.

⁵ Litt. § 37.

By the custom of gavelkind, the wife shall be endowed of the moiety of all the lands and tenements, which her husband held by that tenure.¹ This was formerly called free bench, and was forfeited unless she kept herself sole, and without child. In some boroughs, by custom, the wife shall have for her dower all the tenements that were her husband's; which is also called free bench.² By the custom of most manors, of which lands are held by copy of court roll, the widows of copy-holders are entitled to a certain part of their husbands' lands, and sometimes to the whole, as their dower or free bench.

3. Dower *ad ostium ecclesiæ* is, when a man of full age, when he comes to the church door, (where all marriages were formerly celebrated) to be married, after troth plighted, endows his wife of a certain portion of his land; at the same time specifying and ascertaining the same; on which the wife, after her husband's death, may enter without further ceremony. He might endow her with the whole or such quantity of his lands as he pleased; but the amount or quantity was to be so specified; because, says Coke, the law doth delight in certainty, which is the mother of quiet and repose. This is in all probability the most ancient species of dower.³ This kind of dower has fallen into total disuse.

4. Dower *ex assensu patris*, is only a species of dower *ad ostium ecclesiæ*, made when the husband's father was alive, and the son, with his consent expressly given, endowed his wife, at the church door, of a certain part of his father's lands.⁴

These two last kinds of dower were not absolutely binding upon the wife; for she might refuse them after her

¹ Co. Litt. § 36.

² Litt. § 166.

³ Cruise's Dig. Tit. vi., § 13. Litt. § 39. Bract. lib. ii., c. 39.

⁴ Litt. § 40.

husband's death, and claim her dower at common law, which was the reason that these specific dowers fell into disuse.¹

5. Dower *de la plus belle* was, where a man held some lands by knight service and others in socage, and the widow occupied the lands held in socage as guardian in socage; if in such case the widow claimed dower out of the lands held by knight service, the guardian in chivalry might pray that she should be endowed *de la plus belle* of the lands held in socage; in order to prevent dismembering the lands held by knight service, which were appropriated to the service of the realm.² The abolition of military tenures has put an end to this kind of dower. Accordingly, there are now subsisting four species of dower,³ though the two first only are now in use.

The doctrine of dower has experienced several revolutions since its introduction into England⁴—and of the several species mentioned by Littleton, only one has been adopted in the United States, and that is the dower at common law, as it is usually called—though it is here a matter of statute regulation.

Having given an account of the origin of dower, and of its various kinds, we may hereafter inquire what circumstances are requisite to give a title to dower, and what persons are capable of receiving it.

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¹ 1b. § 41; 2 Bl. Com. 134; Cruise's Dig. Tit. vi., § 15.

² Litt. § 48.

³ 2 Bl. Com. 132; Cruise's Dig. Tit. vi., c. 1, § 8.

⁴ Nothing can more pointedly illustrate the change which has taken place in England, in regard to the institution of dower, than the remark of Mr. Park, in his late work on the subject, that, at the present day, "the existence of dower is rarely adverted to, even by professional men, in any other light than as a dormant incumbrance on a title."

ART. III.—THE INSOLVENT LAW OF MASSACHUSETTS.

THE recent adoption of an insolvent or bankrupt system, by the legislature of Massachusetts, almost without discussion (though not without consideration) and as it were by general consent, is an event in our legislative and judicial history, which deserves some notice at our hands.

The principle of an equal and ratable division of the estate of a deceased insolvent, among all his creditors, without discrimination, was, we believe, early established in every part of New England; but, by the laws of Massachusetts, as they existed not long since and had stood for many years, a creditor was allowed to strip his living debtor of every particle of visible property, to the exclusion of every other creditor, and, in default of satisfying his demand thereby, to arrest and imprison the debtor's person. The severity and injustice of these coercive measures, when carried to their full extent, (and their exercise was only limited by the creditor's will) had already led to a very considerable modification of the law of debtor and creditor, when the legislature in March, 1831, passed a resolve, authorizing the appointment of commissioners, "to consider the expediency of providing by law, for a more equal and equitable distribution of the estates of insolvent debtors; for the abolishing of imprisonment for debt, in all proper cases, and for making such further provision in the existing laws, touching debtor and creditor, as the said commissioners might deem proper." In pursuance of this resolve, Messrs. Charles Jackson, Samuel Hubbard, and John B. Davis, were appointed commissioners. These gentlemen, in the month of June following, made their report recommending to the legislature then in session, the adoption of a

bill drawn up and submitted by them, "for the relief of insolvent debtors, and for the more equal distribution of their effects," which embraced all the several subjects referred to them, and constituted in fact a complete insolvent code. The report was accompanied by a brief analysis of the bill, together with a sketch of its practical operation as anticipated by the commissioners, and "an exposition of some of the motives and considerations, by which they had been influenced in their deliberations on the subject." The provisions of the proposed law were founded upon two leading principles, which were precisely the reverse of those of the common law, by which the relation of debtor and creditor had hitherto been regulated. The latter admitted the right of an insolvent debtor to prefer any one of his creditors, and to pay him in full to the exclusion of all the others, and also the right of a creditor, to seize upon the entire property of his debtor, and to appropriate it to the payment of his claim, without regard to the equally just and meritorious claims of others. The bill, reported by the commissioners, on the contrary, recognized the principle of an equal and ratable division of the debtor's property among all his creditors, and, as a necessary consequence, the debtor's right to a discharge from all further liability to their demands.

It was hardly to have been expected, that a law of so much importance, which proposed indeed an entire change in the relation of debtor and creditor, should be adopted at once. The legislature of 1831, which, by the then recent alteration of the constitution, was limited in its duration to the short summer session of that year, ordered the commissioners' report to be printed, and referred the whole subject to their successors. In the legislature of 1832, the bill passed in the senate, but was postponed in the house of representatives. In 1833, and also in 1834, it was again brought forward in the house, but without success. In the latter

year, however, the passage of an act, abolishing nearly all that remained of imprisonment for debt, dispensed in some degree with the necessity of the proposed law. In the legislature of 1835, the same general subject was renewed, and referred to the committee on the judiciary, who reported that it was not expedient at that time, in view of the revision of the statutes then in progress, to take any order on the subject.¹ But the revision of the statutes took place, and the relation of debtor and creditor was left substantially as before. The attention of the legislature was again called to the subject in 1836, and not entirely without result. An act was passed, which recognized the mode of voluntary assignment by an insolvent debtor for the benefit of his creditors, as a valid and legal transaction, if the deed of assignment provided for an equal and ratable division of the property assigned among all the creditors, but not otherwise. This statute established the principle of an equal division of the property of an insolvent; but it contained no provision for compelling an unwilling or inconsiderate debtor to make such a division; nor did it preclude a voluntary insolvent from arranging his affairs in such a manner, as to prefer one creditor or set of creditors to others, by means of mortgages and friendly attachments; it consequently added little or nothing to the validity of a fair and honest assignment; and has been almost wholly ineffectual, to prevent the frauds and abuses connected with the system of preferences. In short, the statute of 1836, though it changed the form, cannot be said to have changed the man-

¹ The report alluded to, which was drawn up by Theophilus Parsons, Esq., then a member of the house of representatives from Boston, and chairman of the committee on the judiciary, exposes the evils and abuses of the voluntary assignment system, in a very clear as well as animated and eloquent manner. It was widely circulated at the time, and has greatly contributed to prepare the public mind for the adoption of an insolvent system.

ner, of settling the affairs of an insolvent debtor. The year 1837 passed over, without any legislative modification of the law of debtor and creditor; but the numerous and distressing failures,—the depression of business,—and the derangement of the currency,—for which that year will long be memorable, were far more effectual in preparing the public mind for the new system, than all the appeals of justice and humanity during long years of prosperous fortune. The legislature of 1838 revived and enacted, almost without alteration, the insolvent code reported by the commissioners appointed in 1831.

Before proceeding to lay before our readers an outline of the leading features of the new system, which it is the main purpose of the present article to do, we shall present them with a view of the operation of the voluntary assignment system, the evils and abuses of which still continued to exist, notwithstanding the statute of 1836; and, for this purpose, we shall avail ourselves of the report already mentioned, which was made to the house of representatives in 1835.

The injustice of the right of unlimited preference on the one hand, and that of unlimited attachment on the other, in reference to mercantile transactions, led many years since, to the introduction of the practice of voluntary assignments for the benefit of creditors; and this practice, for want of a bankrupt or insolvent system, gradually became established as the ordinary mode of winding up the concerns of an insolvent debtor. It is not to be supposed, that these assignments have never been resorted to but for dishonest and fraudulent purposes; the character of our mercantile and business community altogether precludes such a suspicion; but it is quite probable, or rather, almost certain, that they have, directly and indirectly, been productive of as much fraud and injustice, as could ever have been perpetrated under the old system of attachments and preferences. In

reference to the nature of the arrangements generally effected by means of assignments, the report of 1835 remarks :—

“ That assignments are, sometimes, at least, made and settled without any intentional dishonesty whatever ;—that the assignees are chosen only because they are thought best qualified for that office ; that the property is given up without any concealed reservation ; and that the prescribed distribution acknowledges no preferences but those which the law allows and custom requires ; and that all the arrangements are carried into effect without suspicion of fraudulent conduct on any part,—your committee know ; and it can only be regretted that such instances are not more frequent. When they occur, they are to be regarded as exceptions ; and the system itself is radically and thoroughly wrong, and productive of wrong, from beginning to end.”

This mode of settling the affairs of an insolvent debtor is thus described :

“ A failing debtor usually arranges his affairs by an ‘ assignment.’ This is an instrument by which the debtor transfers his property, or as much of it as he chooses to give up, to one or more assignees, who are to convert the same into money, and divide it among the creditors who become parties to the instrument ; and, as it usually contains a clause discharging the debtor, no creditor can have any share of the property assigned but by releasing the debtor from the whole of his debt. This would not be unfair, if the debtor gave up his whole property to his creditors, without preference ; but your committee fear that this occurs seldom, very seldom indeed. The usual custom is, to prefer certain creditors ; that is, to provide by the terms of the assignment that a certain number, whose names are specified, shall first be paid in full,—then, if any thing be left, certain other creditors are to be paid ; and so, perhaps, through two or three sets ;—and, finally, the creditors generally are to share among them what is left after these various preferences are satisfied.”

“The assignees are, almost always, friends of the debtor, and are usually among the preferred creditors. The general creditors have no voice in selecting the persons who are to hold the whole property, which ought to be, in fact, *their* property, from the moment of the assignment; and the assignees have, but too often, a direct interest adverse to that of the general creditors, and a strong inclination, from obvious causes, to favor the debtor at their expense; and if, when about to fail, the debtor has arranged his plans so as to leave property in his own hands, or to get it, through sales or liens, into hands which will obey his bidding,—he will probably choose assignees who will help him, or who will be unlikely to detect and disappoint his purposes.”

Preferences being allowed in assignments, it would of course happen, as had already been the case, under the system of unlimited attachment, that those creditors, who thus contrived to be paid in full, were not always the most meritorious. The report continues :—

“There should be no preferences; but, if there were any, it is certain that they who are usually preferred, and who now, by virtue of custom, consider themselves entitled to a preference, are, of all others, precisely those who should not be preferred. They are the indorsers and lenders of money. They are the persons who have given to the debtor the credit or the funds which have sustained him long after he was actually insolvent, and have extended the mischief which his stoppage occasions far beyond its natural limits. Moreover, it often, not to say usually, happens, that these endorsers and lenders *know*, while they are giving this false credit, that the debtor is insolvent; but they go on, trusting for their safety to the debtor's promise that *they* shall not lose, and to the usage which the debtor dare not depart from, if he be inclined to. It is obvious, that a debtor so situated is not only compelled to pay the heavy tax which the prey of the usurer must pay, but is tempted to indulge in extended and venturesome speculations, in the hope, that, by good fortune, he may redeem him-

self before his credit is utterly lost ; for, if he do not succeed, he can but fail in the end. This goes on, and his debts are doubled or trebled, until these endorsers and lenders can go no further with safety to themselves. The debtor must then stop,—and his whole assets go to satisfy those who have assisted, if not enticed him into this depth of embarrassment, and the innocent creditors, who knew him only as a merchant and a customer, get nothing. It not unfrequently happens, that the preferred creditors do not stop their debtor soon enough ; and not only the long list of general creditors who bring up the rear of the schedules, but the more exclusive party on schedule A and schedule B, find that the property bears a most unhappy relation to the demands upon it.”

The following is a description of some of the modes of *raising the wind*, resorted to by insolvent debtors, to keep up appearances and sustain themselves by a false show of credit, which could not easily happen under any tolerably well contrived insolvent or bankrupt system.

“ After debtors have gone as far, as indorsers and lenders, who are themselves men of property, are willing to let them go, they often find other debtors, who, like themselves, have but half a credit, and they contrive to put their halves together. Thus it is known, that after the banks and brokers have found it prudent to be very short of funds, when some suspicious individual applies for money, they will still go on to discount his *business paper* : that is, they will not lend him a thousand dollars, but if he has actually sold that amount of property, and taken a note for it, they may be willing to discount that note. Now a debtor may have exhausted his credit up to this point at his own bank, and may find a friend in the same predicament as to some other bank. They have no goods to sell, but they can give each other notes for an equal amount, making it an uneven amount of dollars and cents, to give the notes the appearance of business paper,—and both banks fall into the trap. These are called exchange notes. If there is any

fear that this arrangement may be detected by some accident bringing the two notes together, the danger is avoided by having them of unequal sums, or by making but one note, which is discounted at one of the banks, and the proceeds are shared. These are called *halved* notes ; and it is not particularly uncommon to find both exchange notes and halved notes, among the matters which failing debtors have to take care of."

Little as the chance might be, for creditors on the unpreferred list to obtain payment of their debts in ordinary cases, it was liable to become still smaller, by the interruption which an obstinate and uncompromising creditor might throw in the way of the proceedings.

"The trustee process, by which persons who are alleged to have any property of a debtor in their hands, can be compelled to answer any questions which may be put to them, is the principal preventive and discoverer of frauds in assignments. Yet, such is the thorough viciousness of the present system, that this very process is made the means of fraud. Thus, a creditor who holds a note of two or three thousand dollars against a debtor, which will not be due for a month to come, is probably the first man asked to come into the assignment, after those in the secret have set their names to it. He is applied to, for the very reason that he cannot sue (his note not being due), and will be thought likely to sign, to secure his chance of getting something before it is too late ; and his example will bring others in. He signs it. He finds the assets promise a small dividend, if any, beyond the preferred debts ; he sees, perhaps, among the preferred creditors, persons who are preferred for no other reason whatever, but because, their debts being due, they might commence an action, if not propitiated by preference. He thinks this manifestly unjust, and he finds some small creditor whose debt is due, and he engages to pay this debt, on condition that the creditor commences an action on it at once, and trustees the assignees. The legal effect of thus interposing a trustee process has not been positively ascer-

tained by decision of the courts ; but a custom prevails, and is now almost universally acquiesced in, by which the trustee process is considered as *arresting* the assignment, if the trustees are not discharged ; and *all* who execute it, before the process is served, are paid in full ; then the *trusteeing creditor gets his money*, and what is left goes to the creditors who sign after the trustee process is served. It is obvious, therefore, that the creditor who has employed these means, because his debt was not due, has secured his debt, if there be money enough to reach him, and must be paid in full, before any creditor, who comes after him can be paid at all."

We shall conclude our account of the character and working of the voluntary assignment system, by two more extracts from the report, to which we have already been so largely indebted. The first exposes the temptation, which this system holds out to capitalists, to commit gross frauds upon the public, under the pretence of lending a friendly hand to some young friend.

"But it is upon the young traders of this community, that the present insolvent system operates most injuriously ; so injuriously that it would be difficult to devise or imagine any thing worse. Cases are said to have occurred, in which an established wholesale dealer accommodates his former apprentice or clerk, upon his entering into business, with nearly all the stock the young man needs, on long credit ; he watches his youthful friend, and perhaps lends him his name, or possibly, a little money, and his shelves are gradually well filled ; and if, at the end of a year or two, the profits are too small, or the expenses too great, an assignment pays this kind friend in full ; and *if* he accommodated the young man with a large proportion of time-worn packages, and put them at the cost, he has succeeded in relieving his own store from a grievous burthen, to his own great advantage."

The following extract doubtless contains a true description of the situation, to which an unsuccessful attempt in busi-

ness, and a failure by means of a voluntary assignment, have reduced many a worthy and industrious young man.

“Just such cases as the above [mentioned in the preceding extract,] may be thought too peculiar to have occurred often; and there is certainly enough of honesty and right feeling in our trading community to make them rare; but it is certain that the present laws permit this abuse. The instances are innumerable of young men, who have been burthened for life, and inextricably embarrassed, in another and more common way. Their story is short and simple. They begin life flushed with hope and full of enterprise. Friends help them through kindness; endorsers lend them their names in return for the same accommodation or for other reasons, and the very extent of this indulgence, (which arises from the security this system gives to friends and indorsers,) urges them forward and out of their depth, and when they *must* fail, usage and their promises compel them to prefer these creditors; the preferences exhaust their means; the general creditors see that they shall get little or nothing, and will therefore give no release; and these young men, in the very prime of life, and perhaps without ever having had a dishonest thought or purpose, are inextricably buried under a load of debt. Time offers them no hope, for a judgment against them is good for twenty years, and may be continually renewed at a trifling expense. Their very indebtedness is an absolute bar to their pursuing those occupations to which they were bred, and by which alone they could ever pay their debts; and, as a last resort, they leave their native State, and seek, in exile, that opportunity for exertion which their never dying debts forbid them to expect at home.”

Such was the practical working of the voluntary assignment system, which the law of 1836 vainly attempted to regulate, and which it is the object of the new insolvent law wholly to supersede. The former was as bad as can well be imagined. The latter is as yet an untried experiment; but, so far as can be predicted beforehand, it seems, to say the

least, as well calculated as any plan hitherto devised to effect the objects of a bankrupt or insolvent law. We proceed now to give a synopsis of its principal provisions.

The Insolvent Law of Massachusetts, established by the statute of 1838, chapter 163, entitled, "an act for the relief of insolvent debtors, and for the more equal distribution of their effects," is founded upon two plain and familiar principles: *first*, that when a debtor is unable to pay all his debts in full, his property ought to be equally divided among all his creditors; and, *second* that when a debtor, without any fraud or gross misconduct on his part, is unable to pay all his debts in full, he ought to be discharged from his liability therefor, upon surrendering all his property for the benefit of his creditors.

To carry out these principles practically, and thereby to effect the twofold purpose of distributing the property of an insolvent equally among his creditors, and of discharging him as far as can be done from further liability to their demands, the statute above-mentioned empowers each of the judges of probate and masters in chancery, within their respective counties, upon the application of a debtor himself, or of certain of his creditors, to take measures for the collection of all the debtor's property, and for appropriating it equally to the payment of all his creditors; and, upon the debtor's complying with the conditions and requisitions of the law, to grant him a certificate of discharge from his liability for debts previously contracted.

POWER AND DUTY OF JUDGES OF PROBATE AND MASTERS IN CHANCERY, IN CASES OF INSOLVENCY.

The judges of probate and masters in chancery are invested with jurisdiction, in the first instance, of all cases of

insolvency, occurring in the counties for which they are respectively appointed, and are authorized and required to superintend and regulate the proceedings therein.

The general powers and duties of these officers, in respect to matters of insolvency, as declared in various parts of the statute above referred to, are the following ; 1. To receive the petition of the party, whether debtor or creditor, who wishes to avail himself of the provisions of the insolvent law, and to decide thereon, whether the applicant is entitled to relief ; 2. To issue a warrant, appointing some person as messenger, to take possession of the debtor's estate, to give public notice of his insolvency, and to call a meeting of the creditors, at a time and place to be appointed in the warrant ; 3. To attend and preside at all meetings of the creditors, to regulate the proceedings thereat, and to adjourn the same from time to time as occasion may require, and to adjudicate upon the claims of the creditors ; 4. To assign the debtor's estate to the assignee or assignees chosen by the creditors or appointed according to law ; 5. To appoint a clerk to record the proceedings in each case ; 6. To administer all oaths, that may be required in the course of the proceedings ; 7. To audit and settle the accounts of the assignees, and to order dividends, from time to time, of the proceeds of the estate ; and, 8. To grant the debtor a certificate of his discharge, if satisfied that he is entitled thereto by law.

At the commencement of the proceedings in each case, the judge or master is required to appoint a clerk, who is to be sworn to the faithful discharge of his duty, and may be removed at pleasure. The duties of this officer are, to keep a record of all the regular meetings of the creditors, and of all the proceedings thereat,—to preserve all papers filed in the course of the proceedings,—and to perform such other duties appertaining to his office, as shall be prescribed by the judge.

The record of the proceedings in each case, and all the papers filed therein, are required to be enclosed together, and, at the termination of the proceedings, to be deposited in the probate office of the county, to be there preserved under the care of the register of probate; and copies of all parts thereof, certified by that officer, are declared to be admissible as evidence, *prima facie*, of the facts therein stated.

In general, the judges of probate only are mentioned in the statute; but, by the seventeenth section, the same jurisdiction, power and authority, are conferred upon the several masters in chancery, within their respective counties, as if they were in every instance specially mentioned. The same section also provides, that, in case of the death, absence, or inability of any judge or master, before whom any proceedings are pending, any other master or judge may take his place.

The proceedings of the judges of probate and masters in chancery, in cases of insolvency, are subject to the general superintendence and revision of the supreme judicial court, as a court of chancery. This court is authorized, from time to time, to make such general rules and forms, as may be necessary to establish and maintain a regular and uniform course of proceedings, in cases of insolvency, in all the different counties; and, in all cases arising under the statute, in reference to which there is no other special provision, upon the bill, petition, or other proper process, of the aggrieved party, to hear and determine the case, as a court of chancery, and to make such order or decree therein, as law and justice may require.

APPLICATION FOR RELIEF UNDER THE INSOLVENT ACT.

The statute supposes two kinds of insolvency, namely: *voluntary*, where the insolvent debtor himself wishes to give up all his property to his creditors, in order to obtain

a discharge from his debts, and commences proceedings accordingly; and, *compulsory* insolvency, where the conduct of the debtor shows that he is unable or unwilling to pay his just debts, and the proceedings are commenced by a creditor. Whether the debtor or one of his creditors, however, makes the application, the proceedings subsequent thereto are the same in both cases.

1. *Voluntary Insolvency.* Where the debtor himself commences the proceedings, he applies by petition to the judge of probate or to a master in chancery, for the county within which he resides, or in which he has his usual place of business, setting forth therein his inability to pay all his debts, and his willingness to assign all his estate and effects for the benefit of his creditors, and praying that such proceedings may be had in the premises, as are provided in the statute.

If, upon such application, the judge is satisfied, that the debts due from the applicant amount to not less than five hundred dollars, he forthwith issues a warrant under his hand and seal, to some suitable person, whom he thereby appoints, as messenger, to take immediate possession of the debtor's estate,—to give public notice of his insolvency,—and to call a meeting of the creditors, for the purpose of proving their several claims, and of choosing assignees to manage and dispose of the estate for their benefit.

2. *Compulsory Insolvency.* Where the debtor himself does not commence the proceedings, the nineteenth section of the statute provides, that, under certain circumstances, which show that he is either unable or unwilling to pay his just debts in full, proceedings may be instituted against him by certain of his creditors, for the purpose of compelling an assignment of his property for the benefit of the whole.

The circumstances specified in the statute, upon the occurrence of which, the debtor may be compelled to become an insolvent, are :

1. Where he is arrested for a sum equal to one hundred dollars, founded on any such demand as may be proved against his estate under the statute, and does not give bail before the return day of the process :

2. Where the debtor is arrested and actually lies in prison for more than thirty days, either on mesne process or execution, in any civil action, founded on any such contract, for a sum equal to one hundred dollars : or

3. Where the debtor suffers his goods or estate to be attached on mesne process in any civil action for a sum equal to one hundred dollars, and does not dissolve the attachment on or before the return day, either in the mode provided by the twentieth section of the statute, or in some other mode.

In either of these three cases, any creditor who has a demand amounting to one hundred dollars, which is then due and payable, may petition the judge or master, and, upon proof of the fact which gives him a right to commence proceedings, and of his own claim, may procure a warrant to be issued and proceedings to be had thereon, in the case, precisely similar in all respects to those, which take place on the voluntary application of the debtor himself. These acts of bankruptcy, as they may be called, must be taken advantage of within ninety days.

THE WARRANT.

If, upon the application either of the debtor or creditor, the judge is satisfied that the petitioner is entitled to relief under the statute, it is his duty immediately to take measures to give public notice of the insolvency, and to preserve the estate for the benefit of the creditors. For this purpose, he fixes upon some person to act as messenger,—determines upon the manner in which public notice of the insolvency shall be given,—appoints a time and place for the first meet-

ing of the creditors, for the purpose of proving their debts and appointing assignees,—and issues his warrant accordingly. The time appointed in the warrant for the meeting, must not be less than thirty days after the issuing of the warrant. At this time, also, the clerk is to be appointed.

THE MESSENGER.

The duties of the messenger, as specified in his warrant, are, *first*, to give public notice of the insolvency and call a meeting of the creditors; and, *second*, to take the debtor's estate into his possession and custody.

1. *The notice.* The messenger is required forthwith, upon receiving the warrant, to give public notice of the insolvency, by publishing an advertisement thereof, in such newspapers as shall be designated by the judge in the warrant, and by giving such personal or other notice thereof, to any persons concerned, as the judge shall prescribe. The notice must state that a warrant has issued against the estate of the debtor, and that the payment of any debts, and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him, are forbidden by law. It also notifies the creditors of the insolvent, to meet at the time and place designated by the judge, for the purpose of proving their debts, and choosing one or more assignees of the estate. The publication of this notice is considered, for many purposes, as the commencement of the proceedings; it being necessary to fix upon some time, to which the assignment, and the debt to be discharged, should have relation.

2. *The taking possession of the insolvent's estate, under the warrant.* The warrant also directs the messenger to take possession of all the debtor's estate, real and personal, excepting such as may be exempted by law from attachment, and of all his deeds, books of account, and pa-

pers, and to keep the same safely, until the appointment of the assignees. The duties of the messenger, in this respect, are particularly enumerated in the sixth section of the statute; which also makes it the duty of the debtor himself, to deliver to the messenger such parts of his estate and effects, as may then be within his possession or power, and to disclose the situation of such parts thereof, as may then be in the possession of others, so as to enable the messenger to demand and receive the same.

FIRST MEETING OF THE CREDITORS.

The first meeting of the creditors, called by the judge in the manner above-mentioned, is held principally for two purposes, namely, the proving of their respective claims, and the choice of assignees to manage and dispose of the estate. At this meeting, it is made the duty of the debtor, to produce a schedule, containing a full and true account of all his creditors, with their places of abode, if known to him, and the sums due to each of them, respectively, together with a description of each debt, the cause and consideration thereof, and a statement of any security, which he may have given for the payment of the same. This schedule is to be delivered to the assignees when chosen.

1. *Proof of debts.* The third section of the statute enumerates the several sorts of claims or demands, which may be proved against the estate of an insolvent debtor, and which must all be in existence, either actually or potentially, at the time of the first publication of the notice of the issuing of the warrant. These claims may be considered under the following heads or divisions:

1. All debts, due and payable from the debtor, at the time of the first publication of the notice, may be proved and allowed at any time, previous to a final dividend.

2. All debts, which are then absolutely due, although

not payable until afterwards, may be proved and allowed, as if payable presently, with a discount or rebate of interest, where there is no interest payable by the contract, until the time when the debt would become payable.

3. All moneys, due from the debtor on any bottomry or respondentia bond, or on any policy of insurance, may be proved and allowed, in case the contingency or loss happens before the making of the first dividend, in like manner as if the same had happened before the first publication of the notice. Debts of this description do not seem to be provable, until the happening of the contingency or loss, and not even then, unless the contingency or loss take place before the making of the first dividend.

4. Where the debtor is liable for any debt, in consequence of having made or indorsed any bill of exchange or promissory note, before the first publication of the notice of the warrant, such debt is considered, for all the purposes of the statute, as contracted at the time when the bill or note was made or indorsed, and may be proved and allowed, as if the debt had been due and payable by the debtor before the first publication of the notice.

5. Where the debtor is liable for any debt, in consequence of the payment, by any party to a bill or note, of the whole or any part of the money secured thereby, or in consequence of the payment of any sum by any surety of the debtor in any contract whatsoever, although the payment in either case is made after the first publication of the notice, provided it be made before the making of the first dividend, such debt is considered for the purposes of the statute, as contracted at the time, when such bill, note, or other contract, was so made or indorsed, and may be proved and allowed, as if the debt had been due and payable by the debtor, before the first publication of the notice. Debts of this description are not provable, of course, until the payment is made.

6. All demands against the debtor, for or on account of any goods or chattels wrongfully obtained, or withheld by him, may be proved and allowed as debts, to the extent of the value of the property so taken.

Where there are mutual demands between the parties, the balance only is to be proved and allowed as a debt against the insolvent, or to be claimed by his assignees as due to his estate.

Where a creditor is secured by a mortgage or pledge of any of the debtor's property, the same may be sold if he require it, and the proceeds appropriated to the payment of his debt, in which case the balance thereof only, if any, is provable against the estate; or he may release and deliver up the security, and be admitted as a creditor for the whole of his debt. But if the property mortgaged or pledged be neither sold nor given up, such creditor is not allowed to prove any part of his debt.

In examining the claims submitted to him for allowance, the judge is authorized in his discretion, to require proof on oath of any debt, and to examine the claimant himself, or his agent, if he employ one to present his claim, and also the debtor, upon their respective oaths or affirmations, touching all matters relating to the debt in question.

The fourth section provides for an appeal from the decision of the judge, by any supposed creditor, whose claim is wholly or in part rejected, or by the assignees, if they are dissatisfied with the allowance of any claim. If the debt or claim exceeds the sum of three hundred dollars, the appeal is to be made directly to the supreme judicial court, otherwise to the court of common pleas.

By the twelfth section of the statute, it is provided, that all debts due by the debtor to the United States, or to any persons, who, by the laws of the United States, or of this State, are or may be entitled to a priority or preference with respect to such debts, shall have the benefit of such priority

or preference, in like manner as if the statute had not been passed. Debts of this description are consequently to be first paid in full; and the twenty-fourth section provides, that claims for labor, performed in the service of the debtor, within sixty-five days prior to his insolvency, and not exceeding the sum of twenty-five dollars to any one laborer, shall be deemed to be preferred debts, and be paid in full, next after the debts mentioned in the twelfth section.

One of the principal objects of the first meeting of the creditors is the proof of their demands against the estate; but it is obvious from the nature of the various claims, enumerated in the third section, as provable against an insolvent, that there may be many claims, which will ultimately become provable, but which are not so at the time of the first meeting; it is equally clear, too, that where the business transactions of the debtor have been at all extended, it may sometimes happen that remote creditors will not receive notice of the meeting at all, or not in season to attend at the time; and it is therefore provided in the thirteenth section, that, at every regular meeting of the creditors, as well as at the first, those who have not proved their debts may be allowed to prove the same.

For the purpose, however, of the choice of assignees, the debts provable and actually proved at the first meeting, are deemed to exhibit the true condition of the debtor's affairs; though for the reasons already stated, the number and amount of the debts may be subsequently increased or diminished; but if the assignees then chosen should not be approved of by the creditors, who afterwards come in and prove their debts, it is in the power of the latter to remove them, at any meeting called for the purpose, and to appoint new ones in their stead.

2. Choice of Assignees. When the creditors attending the first meeting have proved their debts, in the manner above-mentioned, a list thereof is to be made out and certi-

fied by the judge, and filed in the case; and the creditors are then to proceed, in the presence of the judge, to the choice of one or more assignees of the estate of the debtor; which choice is to be made by the greater part in value of the creditors, according to the debts then proved and allowed.

When the creditors present at the meeting amount to five and less than ten in number, the votes of two at least, and when they amount to ten, the votes of three at least, are necessary to a choice.

If no choice is made by the creditors at this meeting, the judge is authorized to appoint one or more assignees; and if any assignee neglect to signify his acceptance of the trust, within four days, the judge may appoint another in his place.

The assignees so chosen or appointed may be removed, and the vacancy occasioned by such removal, or by death or otherwise, may be filled, by the creditors, at any regular meeting called by the judge for that purpose.

The assignees being chosen or appointed, in the manner above-described, the judge, thereupon, by an instrument under his hand and seal, assigns and conveys to them all the estate, real and personal, of the debtor, excepting such as is exempted from attachment, together with all his deeds, books of account and papers relating thereto.

The assignment relates back to the time of the first publication of the notice, and vests in the assignees all the property of the debtor, both real and personal, which he could then by any way or means have lawfully sold, assigned, or conveyed, or which might have been then taken in execution on any judgment against him, and supersedes all attachments of his property on mesne process, existing on that day; it also vests in the assignees all debts due to the debtor or to any other person for his use, and all liens and securities therefor, and all his rights of action for any goods or estate, and authorizes them to redeem all mortga-

ges, conditional contracts, pledges and liens, of or upon any goods or estate of the debtor, or to sell the same subject to the incumbrance; and, finally, the assignment gives the assignees the same remedy, to recover the estate, debts, and effects, in their own names, which the debtor himself would have had, if the assignment had not been made.

The assignees are required, immediately upon receiving the assignment, to cause the same to be recorded in the registry of deeds, in each county within the state, in which there may be any real estate of the debtor, on which the same may operate; and also to give public notice of their appointment, in such manner as the judge shall order. Their general powers and duties, in the management and disposition of the estate committed to them, are specified in the eleventh section of the statute.

SECOND MEETING OF THE CREDITORS.

The seventh section directs the judge to appoint a second meeting of the creditors, to be held at such time as he shall think proper, within three months from the date of the warrant to the messenger. The principal object of this meeting is to receive the debtor's oath, that he has made a full disclosure and delivery of all his estate, as required by the statute, and thereupon to grant him a certificate of discharge.

1. *Debtor's Oath.* For this purpose, the debtor is allowed to amend the schedule of his creditors, presented by him at their first meeting, and to correct any mistake therein; and he is then required to make and subscribe an oath, in substance, that the account of his creditors, contained in the schedule, is in all respects just and true, according to his best knowledge and belief; that he has delivered to the messenger, and, since their appointment, to his assignees, every thing which he is required by law to deliver to those officers respectively; that if any thing shall

thereafter come to his knowledge or possession, which ought to be assigned and delivered to the assignees, he will forthwith disclose or deliver the same; and that he has not in any way made over, or in any manner disposed of, any part of his estate or effects, for the future benefit of himself or his family, or to defraud his creditors.

2. *Certificate of Debtor's Discharge.* If it then appears to the satisfaction of the judge, that the debtor has made a full disclosure and delivery of all his estate, as required by the statute, and that he has in all things conformed himself to the directions thereof, the judge is required to grant him a certificate of discharge, unless the granting thereof is objected to in writing by one half in number or value of the creditors, who are so respectively for not less than fifty dollars each, and who have duly proved their debts.

The effect of the certificate, which is made as extensive as is supposed to be consistent with the constitution of the United States, is: in the *first* place, to exempt the debtor's person from arrest or imprisonment, in any suit or upon any proceeding, for or on account of any debt or demand whatever, which might have been proved against his estate; and, *secondly*, to discharge the debtor wholly and absolutely from the following descriptions of demands, viz.: 1. All debts actually proved, at any time, against his estate; 2. All debts founded upon any contract made by the debtor, after the going into operation of the statute and provable under the same, if made within the state, and to be performed therein; 3. All debts founded upon any contract made by the debtor, after the going into operation of the statute, which are provable under the same, and are due to any persons resident within the state, at the time of the first publication of the notice of the issuing of the warrant; and, 4. All demands whatsoever, for or on account of any goods or chattels, wrongfully obtained, taken, or withheld by the debtor.

If the judge does not see fit to grant the certificate, or if the granting thereof is objected to in writing, by one half in number or value of the creditors, whose debts amount respectively to fifty dollars, or more, the debtor may appeal to the supreme judicial court, which is authorized to decide, in the last resort, whether a certificate ought to be granted, and to grant the same, if they think proper.

If the debtor is guilty of perjury in the course of the proceedings, or of fraudulently concealing any part of his estate, or of having made any payment or assignment in contemplation of becoming insolvent, with a view to prefer any creditor, indorser, or surety, the tenth section of the statute declares, that the certificate shall be of no effect.

The same section also enacts, that all payments, assignments, &c., made by an insolvent debtor, in contemplation of insolvency, and with a view to give a preference to any creditor, &c., shall be void; and that any creditor, participating in such fraudulent preference, shall be precluded from proving his debt against the estate, or from receiving any dividend therefor.

THIRD MEETING OF THE CREDITORS.

The first and second meetings of the creditors, which are to be called by the judge, are held principally for the purpose of ascertaining the debts due from the insolvent, appointing assignees of his estate, and granting him his certificate of discharge. The third and succeeding meetings, which are to be called by the assignees, are held for the purpose of receiving and auditing the accounts of the assignees and making dividends of the proceeds of the estate in their hands.

The twelfth section of the statute provides, that a meeting of the creditors shall be called by the assignees, in such manner and at such time as the judge shall direct, to be held within six months from the time of their appointment.

In appointing the time for this meeting, the judge will of course fix it earlier or later, within the limited period, according to the progress which shall have been made by the assignees in collecting and disposing of the estate; and also according to the places of residence of the creditors, giving to all of them, so far as can be done conveniently, an opportunity to prove their debts in season for the dividend.

At this meeting the assignees are required to produce to the judge and the creditors present, fair and just accounts of all their receipts and payments, touching the estate in their hands, and to submit to an examination under oath, as to the truth thereof, if thereto required by the judge.

The judge is thereupon to make an order in writing, under his hand, for a dividend of the estate and effects or of such part thereof as he shall think proper, among such of the creditors of the debtor as shall then have proved their claims, in proportion to their respective debts. In ordering this dividend, the judge is authorized to reserve enough of the estate to meet the claims of the creditors, if he has reason to suppose that there are any, who, from their distance or from any other cause, have not proved their debts.

FOURTH AND SUBSEQUENT MEETINGS.

If the estate of the debtor is not wholly distributed upon the first dividend, the assignees are required, within eighteen months from their appointment, to call another meeting of the creditors in the manner above-mentioned, for the purpose of making a second dividend.

If, at the time of appointing the meeting for the making of the second dividend, any outstanding debts, or other property due or belonging to the estate, remain in the hands of the assignees, which, in the opinion of the judge, cannot be collected and received by them, without unreasonable or inconvenient delay, the assignees are authorized to sell and

assign the same, under the direction of the judge and in such manner as he shall appoint. By this proceeding, the assignees will be in a situation, in ordinary cases, to make a final settlement of the estate, at the meeting for the second dividend.

The statute therefore declares, that the second dividend shall be final, unless there is a suit relating to the estate then pending, or some part of the estate is then outstanding, or unless some other estate or effects of the debtor shall afterwards come to the hands of the assignees; in any of which cases, further meetings may be called, and dividends declared, in the manner already described.

Whenever a dividend is to be made, and at all other regular meetings, creditors who have not before proved their debts are allowed to prove them; and, in that case, they are first to receive such dividend or dividends as the others have already received, so far as it can be done, out of the effects remaining in the hands of the assignees, and without disturbing any prior dividend.

The code of insolvent law, of which we have thus presented our readers with an outline, constitutes a simple, intelligible, and well adjusted system; and, if administered in a liberal and friendly spirit, cannot fail to put an effectual stop to the evils and abuses, which we have described as inherent in the very nature of voluntary assignments. The general superintendence and jurisdiction of all cases and matters, arising under the statute, is given, in the last resort, to the supreme judicial court; which is also authorized to make such general rules and forms, as may be necessary to establish and maintain a regular and uniform course of proceedings therein. That tribunal, therefore, must be ultimately responsible, so far as the administration of the law

is concerned, for the working of the new system ; and, we earnestly hope, that, under the control and direction of its able and learned judges, the insolvent act of Massachusetts, may never give occasion to the reproaches which Lord Eldon once bestowed upon the practices under the bankrupt system of England ;¹ but may be so administered as to promote industry, integrity and honorable dealing, among our citizens.

The *cessio bonorum* of the Roman law being the original type of all the modern bankrupt and insolvent systems, we

¹ "The Lord Chancellor took the first occasion of expressing strong indignation at the frauds committed under cover of the bankrupt laws, and his determination to repress such practices. Upon this subject, his Lordship observed, with warmth, that the abuse of the bankrupt law is a di grace to the country, and it would be better at once to repeal all the statutes, than to suffer them to be applied to such purposes." "Unless the court holds a strong hand over bankruptcy, particularly as administered in the country, it is itself accessory to as great a nuisance as any known in the land ; and known to pass under the forms of its law."

The foregoing passages are extracted from the 6th volume of Vesey's Reports, p. 1., where, under the general title, "In Bankruptcy," the reporter has given a summary of the observations made by Lord Eldon, during the first year of his chancellorship, in reference to the administration of the bankrupt laws.

Chancellor Kent (2 Comm. 392, 2d ed.) and Mr. Justice Story (3 Comm. on Const. 8.) seem to understand Lord Eldon's language as directed against the *bankrupt system* of England, and the latter alludes to his lordship's remarks as "hasty if not petulant." We think it quite clear, however, that the lord chancellor did not intend to denounce the system, but the abuses and frauds which had grown up in its administration ; and, which, on the first occasion that presented itself, he declared his determination to repress. The reason of this course will be apparent, when it is recollected, that the court of chancery exercises a superintending and discretionary power, in a summary way, over all matters of bankruptcy ; and Lord Eldon could therefore very properly signify his intention to repress abuses, to which, if they were suffered to go on, he must himself have been "accessary" ; but which he would hardly have thought of interfering with officially, had they made a part of the bankrupt system itself.

shall conclude this article with a few remarks on the proceeding known under that name. The *cessio bonorum* was a process, whereby persons who had become insolvent by misfortune, might obtain their liberation from imprisonment, upon surrendering their whole estate to their creditors. In the time of the republic, the laws against insolvent persons were exceedingly severe; and so hardly were debtors dealt by, that they were almost entirely at the mercy of their creditors. A law of the twelve tables provided, that debtors who were not solvent within a specified time should be delivered over to their creditors, to be kept in chains and subjected to the harshest treatment. This law was productive at times of great discontent among the people, till at length it was provided, that the persons of debtors should not be given up to their creditors, but only their effects. As the latter enactment, however, provided no means of liberation from imprisonment, and the people were still clamorous for some new law on the subject, the *cessio bonorum* was at length introduced by Julius Cæsar, (it is uncertain, however, whether he or Augustus was the author of it,) which, at first, was only intended for the benefit of Rome and Italy, but was afterwards extended to the provinces. The provisions of this remedy are expressed in the following law of the code: *Qui bonis cesserint, nisi solidum creditor receperit, non sunt liberati. In eo enim tantummodo hoc beneficium eis prodest, ne judicati detrahantur in carcerem; l. 1. Cod. 7. 71.* Exemption from imprisonment, however, was not the only advantage, which resulted to the cessionary: for though he was not discharged from his debts, except to the amount received by the creditors, from the sale of his goods; and the latter might, notwithstanding the cession, have recourse to goods afterwards acquired; yet, in that case, they were not allowed to exercise their strict rights, but were required to leave the debtor the necessaries of life. The cession only gave the creditors a right to cause the goods to

be sold, and to receive payment of their debts out of the proceeds; but the property of the goods remained in the debtor, until it passed to the purchasers, under the sale by the creditors; and the debtor might, therefore, at any time previous to a sale, redeem his goods by the payment of his debts. The debtor by the cession was deprived of the enjoyment of his estate, which was thereupon administered by a syndic, or by some person appointed for that purpose by the creditors. This procedure was adopted in substance by those of the modern European states, whose systems of jurisprudence were formed upon that of the Romans.

It seems, however, that a certain degree of infamy was always attached to those who had recourse to this process. Pothier says that it does not import any infamy of law, but only a kind of infamy of fact. The Italian jurists describe the ceremony of cession to consist in striking the bare breech three times against a stone, called *lapis vituperii*, in the presence of the judge. Formerly, it consisted partly in giving up the girdles and bags in court; as the ancients used to carry at their girdles the chief utensils wherewith they got their living. The following is said to have been the form of cession among the ancient Romans and Gauls; the cessionary gathered up dust in his left hand from the four corners of the house, and standing on the threshold, holding the door post in his right hand, threw the dust back over his shoulders; then stripping to his shirt, and quitting his girdle and bags, he leapt with a pole over a hedge; thereby giving the world to understand, that he had nothing left, and that when he jumped, all that he possessed was in the air along with him.

In modern France, every debtor who claimed the privilege of a judicial cession of goods was required to appear personally in court, in the most humiliating garb, with his doublet unbraced, and no hat on his head. Afterwards, he was carried to the market place, where the cession was pub-

lished. When a trader or banker was admitted to the benefit of cession, he was also obliged to appear in person at the consulate, or, if there was no consulate, before the assembly of the city, and declare his name, surname, quality and residence, and that he had been allowed to make a cession. Even the most innocent, and whatever might be his rank, was compelled to wear a green cap, which was his sole protection against imprisonment. In course of time, however, the green cap fell into disuse. Pothier observes, that, in his time, it was the custom for the judges, on admitting any one to the benefit of cession, to impose upon him, as the condition of discharge from imprisonment, the obligation to wear in public a green cap, to be furnished him by his creditors, and at their expense, under pain of forfeiting the benefit of the cession, and of being liable to be arrested. But, he adds, that, although he had always known this condition to be pronounced, he had never known creditors to make use of it, or to furnish their debtor with a green cap to wear. The only reason for this condition, the same author remarks, is to constrain the citizens, through fear of ignominy, to manage their affairs with discretion, and to avoid exposing themselves to the necessity of making a cession.

By the law of Scotland, the process of *cessio bonorum* can only be instituted in the supreme court; and the privilege is only granted to those, against whom no fraud can be proved. The debtor must have been a month in prison, at the time of bringing his process. The *cessio*, by the Scots law, as well as the Roman, operates only as a security against imprisonment, and not as an extinction of the debt; for if the debtor acquire any estate, subsequently to the release, it may be attached by his creditors. Persons liberated on a *cessio bonorum* are obliged to wear a particular suit, called the *dyvours habit*, unless the court dispense with this mark of infamy, which they generally do. L. s. c.

ART. IV.—CRIMINAL PROCEDURE OF GERMANY, FRANCE AND ENGLAND.

Das deutsche Strafverfahren in der Fortbildung durch Gerichtsgebrauch und Partikular-Gesetzbücher und in genauer Vergleichung mit dem englischen und französischen Straf-prozesse. [The German Criminal Procedure, &c., compared with the criminal procedure of England and of France.] Von Dr. C. J. Mittermaier, Geheimenrathe und Professor. In zwei Abtheilungen, Zweite Auflage, Heidelberg: J. C. B. Mohr, 1832 und 1833.

[Translated from an article by Mr. Foelix, in the *Revue Etrangère et Française*, for December, 1836.]

THE principal object of this work is the criminal procedure of Germany. The author developes the rules and principles, by which offenders are prosecuted, convicted, sentenced and punished, in Germany. In a short introduction, he makes known the end which he has in view, namely, to present the theory of criminal procedure, by making use at the same time of the historical illustrations, offered by a study of its sources, and of the lights obtained by the practice of jurisprudence. For this purpose, he not only goes back to the former ages of the German procedure, but also examines that of England and of France, which, though derived from the same origin with the practice of his own country, bear as little resemblance to it at the present day, as they do to one another. In this manner, the author places before his readers both the entire body and the details of the English and French systems of procedure; and this exposition of the forms of proceeding established in two neighboring countries, though forming only the secondary object of the work, adds considerably to its interest. The

author's method is that which is denominated the historical ; from which, however, it does not follow, that he belongs to the school, known by that name in Germany ; for, so far from being an enemy of codification, he is on the contrary its zealous partizan. He explains the theory of criminal process, according to a logical plan ; and, in reference to each point of his doctrine, gives a historical view of its developement in Germany, in France, and in England. This theory is not, properly speaking, a theory of positive law ; and the propositions which it presents are not drawn exclusively from any given system of criminal law ; they are derived also from the philosophy of law, from politics, and from a comparison with foreign systems ; so that the method of the author partakes at the same time of the different methods made use of in Germany, in the developement of the different parts of the science of law. On the other hand, the German criminal process, which the author describes, is not properly and cannot be a body of principles and rules, founded upon the prescriptions of a system of positive law ; for there is no more a common law of criminal process in Germany, than there is a common government ; the *Carolina* (a criminal ordinance of Charles the Fifth), which might formerly have been regarded as a common law, has lost that character by the introduction of new criminal codes into the most considerable states of Germany, as Austria, Prussia, Bavaria. Mr. Mittermaier has surmounted this difficulty, and presented a general theory of German criminal procedure, founded upon the principles of a sound philosophy, combined or rather compared with the positive laws of the different Germanic states ; and, as the French criminal codes have been retained in the Rhine provinces, since their separation from France and union anew with Germany, we see our own code of criminal procedure occupying a place among these positive laws.

A French reader is at first greatly surprised at this method,

and finds it difficult to conceive, how one could contrive to bring together, and place under a single point of view, laws which admit the free defence, the jury, the public examination, and laws which refuse the defence (such is the criminal law in Austria), admit the torture (this is the case in Baden), and require that the process and the judgment should be secret; some of which, in short, present a medley of dispositions, which are at once liberal and tyrannical. When we reflect, however, that, in a system of criminal process, from which the jury is banished,—and this is the case in all the legal systems of Germany beyond the Rhine,—the theory of proof, that of imputability &c., necessarily occupy a very large place, and that the German writers exercise a great influence over the tribunals, which are accustomed to cite the most distinguished among them as authorities, in their judgments, we shall come to find the method of which we are speaking less ridiculous, and perhaps we shall even conclude to become reconciled to it.

From what we have said of the spirit of the different criminal laws of Germany, it must not be inferred, that criminal justice is there in general hard and barbarous. As in France, the Roman law was introduced by the tacit consent of the jurisconsults, who had studied it in Italy, and, who, either as assessors in the tribunals of the king and the barons, or as advocates, made it a duty to apply the system of Justinian; so, in Germany, the views of philosophy and humanity, which are diffused through the medium of the lectures of professors and the writings of authors, are constantly exerting a powerful influence on the tribunals of that country, where the faculties of law ordinarily form tribunals, judging in the last resort the criminal or civil processes, which are frequently sent to them from all the provinces, and where the judges are exclusively selected from among the pupils of these faculties.

Returning now to the work of Mr. Mittermaier, we shall

attempt to present briefly the principal ideas of *the philosophy of criminal law*, which it contains; our readers will excuse the dryness of the subject in favor of its importance.

According to our author, the fundamental principle of criminal procedure is not a simple but a combined principle; and this combination is the product of the necessity, in which society finds itself, to prosecute one who has been guilty of a crime, and of the right of each citizen not to be exposed to such a prosecution, except so far as the suspicion of his guilt is probable, and not to be liable to the infliction of the legal punishment, except so far as the conviction of his guilt is judicially obtained. The criminal procedure must therefore be organized in such a manner, that the guilty may surely be discovered and punished, without injury to the innocent, or any other inconveniences to the individual prosecuted, than those to which the end of the law of criminal procedure imperiously requires that he should be subjected. As to these inconveniences, their eventual weight, for each citizen, even for the innocent man, is a public charge, which he bears in exchange for the security which society procures him. It follows from thence, that the regulation of the criminal procedure is intimately connected with liberty and with political organization, and must be different, according as the public rights of the people are more or less extended.

The author develops his theory in the following order.

He occupies himself, in the first place, with the principle of criminal procedure, and its principal immediate consequences. We have already indicated the fundamental principle; in regard to its immediate consequences, which are modified principally by the political organization of society, our author presents them in the following manner: either the laws of a people are founded in political liberty, in which case the public power is not regarded as existing for itself, and the people themselves take a part in the gov-

ernment of public affairs ;—or, the public authority is separated from the people, who are consequently excluded from any participation in affairs. In the first case, the dominant idea, in the prosecution of criminal affairs, will be to prevent the encroachments of authority upon the public liberties ; in the second, it will be to cause these affairs to be treated, like all other affairs of the government, as carefully as possible, by the functionaries established for that purpose by the prince. In the first system, the discovery and punishment of crimes will be less in view, than the security of the individual against the public authority ; and the general solicitude, for this end, will cause the presumption of the innocence of the accused to be carried to its highest point. At the same time, criminal affairs will be generally regarded as matters of great importance, and in which each citizen is interested. The distrust, which naturally accompanies the democratic element, is not consistent with any other manner of feeling. Criminal procedure, in France and in England, rests in part upon these foundations. In this state of things, the institutions, the forms, and the tendency, in the matter of criminal procedure, will necessarily demand the publicity of all the proceedings ; since such is the fundamental form of the treatment of public affairs, and the distrust of the people, desirous to control the action of the judge, is opposed to secrecy, as being the means of concealing the attacks made against their liberties. Further, it is the people themselves, who exercise the judicial function, so far at least as to decide upon the facts ; their distrust of the agents of authority not permitting them to allow the latter to exercise this jurisdiction ; and, consequently, in conformity with the nature of every popular tribunal, it is the moral conviction which makes the judgment, without regard to the legal rules concerning the proof of crimes. The procedure also will be oral, as this conviction cannot be attained in a more natural manner, than by oral debates ; which, indeed, publicity

alone would require. It will not be essential to this kind of procedure, that the facts and circumstances should be drawn out in writing; nor, indeed, will written documents have that importance, which an appeal from the judgment to another judge would give them, since it is the nature of the popular tribunal to decide without appeal. Here, therefore, eloquence will have a great influence. In such an organization, the procedure by means of accusation will be the fundamental procedure, and so much the more so, as the government will be deprived of the faculty of making the inquisition. Finally, all vexatious measures towards an innocent party will be discarded in such a system, and it will be an essential condition to the success of an accusation, that the accuser should prove his assertion; he will not be allowed to found himself upon legal presumptions against the accused.

It is entirely otherwise, where the government is constituted separately from the people, and the latter are excluded from all immediate participation in public affairs. Like all other affairs of government, criminal affairs will also be administered by functionaries, by jurisconsults; they will present themselves, like the common affairs confided to the ordinary agents, to be treated according to certain juridical forms; it is true, that the protection of innocence will be sought by prescribing detailed rules of conduct to the judges, by establishing a reciprocal supervision among them, and by multiplying the means of relief against their decisions. A system animated with this spirit leads to consequences, which are diametrically opposed to those of the popular system: 1. Publicity will give place to a very decided tendency to obtain the confession of the accused; 2. The oral proceedings will be replaced by written reports (*procès-verbaux*) of the officers of justice, as the sole means of instructing the judge, to whom the case must be carried in the last resort, in the circumstances of the affair; these written re-

ports receive entire faith in law ; 3. The judgment will be formed according to the juridical rules concerning legal proof, since it is natural for jurisconsults, forming their judgment upon written documents, to follow the rules of their art ; 4. The continual supervision and action of the government will give birth to the inquisitorial procedure, which becomes the more active, as the disposition of the public mind in the people renders the procedure founded upon the accusation of the party injured inefficacious in the greater number of cases ; and 5. The seducing idea, that nothing but a confession can furnish a full and entire ground of conviction, will give to the proceedings an essential tendency towards obtaining the confession of the party accused.

Whatever differences there may be in point of form, every criminal procedure rests upon a mechanism, in which the means employed on behalf of society, to discover the crime and the criminal, may be considered as so many attacks, which are met and opposed by the means admitted for the security of innocence and the defence of the accused. Among these divers means must be reckoned : 1. Such a position on the part of the judge, that he may hold himself obliged to bring together the materials of conviction, with a disposition always ready to take advantage of all the elements proper to establish the innocence of the accused, or even to do away with the idea of the crime altogether ; 2. The state being a powerful adversary, the accused ought to be provided with sufficient means to defend himself ; without this the law of equality would be wounded ; 3. The accuser must be held to prove his accusation, and the accused must be beyond the reach of all punishment, if the accusation is not proved by the accuser ; 4. The superiority of the position of the state, which prosecutes by a jurisconsult, requires that the accused should be provided with a defender, who is also a jurisconsult. We observe, that the author confines himself to providing the accused with a defender ; he does

not admit the idea, which some have advanced, of an officer commissioned by the state to draw up the means of acquittal, acting independently of the officer appointed to prepare the case on the other side.

It results further from the fundamental principle: 1. That the position of the judge must be independent in this sense, that he should not be removable from office, and should be at liberty to follow his own convictions; 2. All influence of the government over criminal justice (*Cabinets-Justiz*, justice emanating from the cabinet of the prince,) must be avoided, so far as it might tend to the injury of the accused. The author admits, that the prince may interfere in the criminal justice, to abolish prosecutions, even before judgment (*right of abolition*): if he understands thereby the concession of an amnesty, that is to say, a pardon granted to a whole category of individuals, (*a general pardon*), we shall not contradict him; but we cannot admit a right of individual abolition; for how, in fact, could such a right consist with the common principle of penal law, and of criminal procedure? 3. All exceptional commissions or tribunals must be dispensed with. The author is himself obliged, considering the state of the positive law, to restrain this rule to the case, in which the law would provide otherwise, and this is precisely the case of the laws of almost all the states of Germany. It is not easy to conceive of a theory of positive law, which is contradicted by the positive legislation; but the philosophical method of the German professors is not at all constrained by such an opposition. We have already indicated the reason of this singularity, and have seen that it is not without its practical influence.

One guaranty of the persons accused, required by the principle itself of criminal procedure, is, that they should have the power to challenge judges whom they justly suspect. The author, with reason, criticises the prejudice, which, in the matter of challenge, makes the respect due to

the character of the judge prevail over the interest, which the accused has in not being judged by one against whom he has just grounds of distrust.

The author shows afterwards how the criminal procedure in Germany, from accusatorial as it was in its origin, became at length inquisitorial; this change was gradual, and even the *Carolina* regards the prosecution upon the accusation of the party injured, as the ordinary case, whether the party to the prosecution be the prince, as the guardian of the public peace, making the complaint by his attorney, (*procureur fiscal*), or the private person injured by the offence. But, says the author, the more the citizens lost their taste for public affairs, the more the police extended its power, and the more official prosecutions were multiplied; so that the inquisitorial procedure must be regarded as the ordinary procedure according to the common law; it has also been sanctioned as the ordinary procedure by the new codes.

The author demonstrates, that, upon principle, and in a country like Germany, criminal prosecutions cannot depend upon the party injured, without falling into the inconvenience which has been pointed out by all the authors, who have written on the judiciary organization of England, to wit, the impunity of a great number of crimes, to the great peril of the public order. The greatest evil, alleged against the inquisitorial procedure,—that of being destitute of a basis for the prosecution,—of creating an interest in the judge in the success of a prosecution commenced by himself,—and of thus becoming the source of arbitrary acts,—may be easily avoided, by combining the accusatorial with the inquisitorial procedure, in such a manner, that the preliminary investigation shall take place officially on the part of the judge, and that when a particular person is put in accusation, a public functionary distinct from the tribunal shall then present himself as accuser, with an act of accusation serving

as a basis for the definitive examination. This is very nearly the system of our criminal procedure ; but it is far from being the practical system of Germany ; there, on the contrary, the inferior judge prepares a statement of the case inquisitorially, that is, of his own proper motion ; and when he thinks it sufficiently matured for a definitive decision, he sends the documents to the superior judge, who pronounces definitively, and remits the sentence to the first judge to be put in execution. This procedure, dangerous in principle, is corrected in practice, through the numerous means of redress, which are open to the condemned, and some of which are even employed officially. It is true, that, in this way, a criminal process ordinarily lasts several years. The author, upon a comparison of the French with the German procedure, observes, that the first rests in a great part, but not exclusively, upon the principle of the accusatorial process, combined however with the inquisitorial element. He thus corrects the opinion advanced by him in his first edition, according to which the French procedure was founded exclusively upon the principle of the accusatorial process.

The author passes to another consequence of his principle, namely, publicity. Judging from the place which it occupies in his system, one would suppose it to be of common right in Germany ; but, in fact, it exists nowhere in that country, except in the *ci-devant* departments of the Rhine ; it would be contrary to the *Carolina* and the new German codes. The author's method is always the same characteristic method of his countrymen, the philosophic-scientific. Let us hope, that it will bear its fruits, and that if Germany historically adopted the collections of Justinian, because it was so willed by the jurisconsults of the time, she will also adopt the reforms which the present jurisconsults are making in advance in their treatises, provided her good genius shall take care, that the mystic-philosophic ideas of

some of them, as developed in their works, and embraced by a good number of followers, do not obtain the upper hand. The author thus states the grounds of publicity in criminal proceedings: "The publicity of criminal proceedings is founded naturally, on the one hand, on the interest, in virtue of which society participates in them, as it were, as a party complaining, being directly or indirectly offended by every crime; and, on the other, upon the circumstance, that the people observe with anxiety the issue of an accusation brought against one of themselves." After having shown how the ancient Germanic publicity disappeared before the inquisitorial procedure, and terminated by giving place entirely to written documents, he declares that the criminal procedure of Germany does not acknowledge publicity, either in relation to the accused, who is not admitted to the hearing of the witnesses, or in relation to the superior tribunal, which takes cognizance of the acts of the information only by the written report of the inferior judge, and still less in relation to the public; and, that it has been vainly attempted to remedy the inconveniences of secret procedure, by the multiplied interrogatories of the accused, in each of which he is summoned to present his means of defence, by his confrontation with the witnesses, by the communication, which is made to him, on the closing of the information, of all the charges and all the proofs, and at the termination of which he is admitted to present his defence. The measures, which have been taken to guard against the inconvenience, resulting from the want of publicity in relation to the judge, are also insufficient; the greatest exactness has been prescribed in the reports; protocols of the gestures (*Gebörden Protokolle*) have been introduced, in which the judge is required to describe the gestures, the changes of countenance, and the inflexions of voice, of the accused, during the interrogatories; the inferior judges have been subjected to the rigorous control of the

superior, and a law has been made requiring the appointment of competent persons to the office of judge; but all these measures are insufficient to supply the place of oral debate and personal examination. It is equally impossible, too, to supply the want of publicity, in regard to the people, by multiplying the means of redress against the sentence of condemnation, or by printing the judgments. Acknowledging the defects of such a state of things, the author at the same time observes, that the definitive examination and the judgment depend exclusively upon the written documents; and he seems to say (§ 30) that these reports present the judge with a faithful image of what has taken place. But this becomes at least doubtful, by what he has himself said a little previous (§ 29).

The first chapter is terminated by a judicious observation. The regular criminal procedure is composed of certain acts, which are essential to it by its nature, that is to say, without which it would be despotic or null, or as not having taken place. These are, the complaint, when the action of the criminal justice is made by law to depend upon it,—the competence of the judge,—and the faculty given to the accused to bring forward his answers and defences. The formalities are another sort of conditions, which, being prescribed expressly by the law, concur in rendering the procedure legal. It is necessary, however, for this purpose, that they should be prescribed under pain of nullity. What then is the effect of the non-observance of those which are prescribed without this sanction? The author thinks, that, in general, we ought to regard them as advisory rather than imperative; and that those only ought to be observed on pain of nullity, which are entirely connected with those essential conditions of the procedure, to which we have above alluded. This is, at bottom, the distinction, which is made in France, between substantial and unsubstantial formalities.

The author gives the following view of the German judiciary organization, in criminal affairs. The criminal judges are inferior judges charged only with the information, each of whom acts alone within his own jurisdiction, and who transmit written reports (*proces-verbaux*) of the cases investigated by them to the superior judges, constituted into collective tribunals. The inferior judges are appointed, either by the prince or by the mediatised lord, according to the places, for which they are named; and, in the greater number of the German states, they are charged with the administration properly so called. Such being the case, one may easily imagine the melancholy condition, to which the criminal information must be reduced in their hands; it is in this stage of the proceedings, that disciplinary punishments for obstinacy or disobedience intervene; and secrecy, blows, and the dungeon with its chains, are welcome auxiliaries to a judge, who is overwhelmed with affairs of all sorts, pressed to bring the proceedings to a close, and troubled beforehand by an idea of the reproaches and censures, which he has ordinarily received from his superiors, on occasion of the processes which he has drawn up. The superior judges or tribunals are the aulic courts, or courts of the circle, or chanceries of justice. The collective tribunals take cognizance of all the incidents of the information, and decide the cases definitively, but subject to appeal. The appeal is made to superior courts, charged at the same time with a superintendence of the inferior tribunals, which is not only disciplinary, in the judicial sense, but also administrative; and this superintendence is another cause of the dependence of the inferior judges. In the law faculties of a majority of the German universities, colleges of justice are also erected, to whose revision, judgments and decisions are frequently referred. The judge who conducts the preparatory investigation and draws up the report (*juge-instructeur*) must regularly be assisted by two *echevins*,

or assessors,—a relic of the ancient authority of the *echevins* in criminal prosecutions; this condition, though revived by several of the new codes, is generally regarded as insignificant; and it can hardly be otherwise, considering the want of publicity in the operations of the judge. The comparison of this organization with those of England and of France, which is instituted by the author in this connexion, according to the plan announced by him, leads him to inquire into the value of the institution of the jury, to a country in the enjoyment of European civilization.

The author, though a partisan of publicity, declared himself against the jury, in the first edition of his work; but in the second he renounces this opinion. He examines the jury, under its double character of a political institution, and an institution of criminal law; under the first point of view, the jury appears to him to be a safeguard of civil liberty, on account of the greater confidence, which is attached to judges taken from the body of the people, in preference to those named by the government. So, the jury presents a very proper means for giving life to the public mind, which is a necessary element of a constitutional organization. Considered as an institution of criminal law, it dispenses with the necessity of establishing a theory of proofs, and of confiding too much to the discretion of the judges. The author, however, requires certain conditions for a good organization of the jury, among which are the provisions of the French laws of March 4, 1831, and April 28, 1832.

Our author afterwards explains the nature of the French public ministry, which is unknown in Germany, except in the *ci-devant* departments of the Rhine;¹ in reference to

¹ The term *ministere public* denotes the functions of a particular magistracy, the object of which is to protect the interests of the sovereign and of the public, in each court or tribunal.

which he makes several remarks; but as they do not concern the true German law, we shall pass them over in silence.

Pursuing his theory, Mr. Mittermaier establishes the principles, which should keep the administrative separated from the judicial police, and which give to the latter the exclusive right of ordering or maintaining arrests. He shows how what is called high police is nothing more than the local police, regarded as extended over the whole country, and that this general police cannot rightfully enter upon the domain of justice. The reader will already perceive that our author is here engaged with pure theory; for nothing is more arbitrary than the police in Germany.

After having laid down the rules to be followed, in regulating the competence of the criminal judges among themselves, and having indicated the numerous exemptions from the ordinary jurisdiction (*fors privilégiés*), enjoyed in Germany by public functionaries of an elevated rank, by the professors and students of the universities, the ecclesiastics and the military, (the *ci-devant* immediate barons of the empire also enjoy an exemption from the ordinary jurisdiction), the author takes occasion to speak of extradition.¹ This is admitted without any distinction between natives and strangers; it is only necessary, that the inferior judge, from whom the accused is demanded, should obtain the sanction of his superior to the extradition.

Before passing to procedure itself, Mr. Mittermaier examines its general nature, which he makes to consist in the accusation, whether it be express, or implied in the inquiry undertaken officially by the judge, in the name of the state; in the defence, which, at the commencement, consists principally in the answers furnished by the accused himself,

¹ Extradition is the act of surrendering one accused of a crime, into the hands of a foreign power which demands him, for the purpose of being tried and punished.

and, which ultimately is presented as a formal defence, with the assistance of an advocate; finally, in the investigation of the truth itself, undertaken by the judge, with the aid of the means authorized by law. We cannot follow the author in the developements, which he enters into in this respect; he gives proof of a rare sagacity and erudition, as well as of liberal sentiments, and a great freedom of character. He accordingly criticises without mercy the violation of the secrecy of letters, for the purpose of obtaining proofs or circumstances, and declares himself entirely opposed to the torture, even now employed in certain cases in Baden and in some other states. Giving a historical sketch of the torture, he shows how it passed from the Roman law,—in the decline of which it was employed, not only as originally in regard to slaves, but also against free-men,—into the usages of the Germanic nations, in which, however, it was at first employed only against serfs. The *Carolina*, which could not abolish, modified and subjected the use of it to certain restrictions, as, for example, that it should not be employed unless there were grave and concurring circumstances; the confessions extorted by torture, in order to become evidence against the accused, were required to be repeated by him after an interval and out of sight of the instruments of torture; it was not until the middle of the eighteenth century, that a conviction of the injustice and uselessness of the torture became established in Germany. At the present day, it exists only in some small states, especially in that of Baden, where, however, it is reduced to two cases, viz.: 1. When a criminal, who is entirely convicted of a crime, which could not have been committed without the concurrence of one or several accomplices, obstinately refuses to name his accomplices; and, 2. When a criminal, who is convicted of having concealed objects, making a part of the *corpus delicti*, refuses to tell where those objects are concealed.

Whilst he condemns the torture, the author distinguishes between it and the means employed to punish an accused for obstinately keeping silence, and which are denominated pains of disobedience to justice (*Ungehorsam Strafen*).

These means have been introduced since the abolition of the torture, and are employed against accused persons, who refuse all answer, or feign to be deaf and dumb, or give answers which are evidently illusory, evasive, absurd, or lying. The author points out how easily these inflictions may degenerate into torture; and expresses the opinion, that disciplinary measures only should be resorted to, against actual contempts on the part of the accused, in the course of the proceedings, as a revolt, or an outrage committed against the officers of justice; and that the proceeding should be carried on, without regard to the silence or falsehoods of the accused.

In the fourth and last chapter of the general theory, the author examines the principles concerning the proof of crimes, considered in itself, and independent of the external means of obtaining it. In relation to this subject, we shall do no more than refer to a work specially devoted thereto, which the author afterwards published, under the title, "Theory of proof, in the German criminal procedure, compared with that of the French and English Systems," of which we shall very shortly present our readers with an analysis.

The remainder of the article, from which the foregoing is translated, is occupied with an enumeration of the principal alterations and improvements, made by the author in the second edition of his work, and would be of little if any interest for our readers. We cannot conclude, however, without adding our testimony to that of Mr. Fœlix, to the extraordinary merit of this work. Mr. Mittermaier shows himself familiarly acquainted with all the details,

not only of the German and French systems, which have many things in common, but with the English criminal procedure, which differs very essentially from both the others. He refers to the common sources of the criminal law of England, almost on every page of his book, and frequently also to authors whose works are not much known, we imagine, even to the mass of English lawyers. A subsequent number of the *Revue Etrangère* contains a notice of the work above-mentioned, on the theory of proof in criminal procedure, which we shall transfer to the columns of our next number.

L. S. C.

ART. V.—EFFECT OF THE STATUTE OF LIMITATIONS ON TRUSTEES.

BEFORE the enactment of the statute of limitations, although the staleness of the claim, or the length of time, that the party seeking to enforce it had slumbered over his rights, never operated as a conclusive answer as to an unfounded claim, still, the circumstance was always regarded as furnishing a strong presumption against its justice. The presumption was increased by continued delay, and by the nature of the acquiescence. After a great length of time, the resulting presumption was decisive, and furnished an absolute defence. The time, which was adopted as practically a bar, varied with the discretion of the judge. The effect of the statute was, to ascertain the length of time which should bar, rather than the introduction of a new principle. The basis of the statute is the presumption, that the claim is unfounded. Wherever this presumption fails, the bar has no effect. The presumption is repelled by various circumstances, by an acknowledgment of the defendant,—by a continuing confidence,—and by the existence of the

relation of trustee and *cestui qui trust*. This relation, and its effect upon the statute, we propose to consider; and here we will premise, that some uncertainty has been thrown over the subject, by the vagueness and extended application of the terms used to designate the relation. A trust is said to exist in every case of indebtedness. There may be said to be a trust, in every case, where one man has a claim on another for property,—for services,—and whenever an assumpsit may be raised. The term trust is here used as convertible with duty. In this sense, a trust may be said to exist between a merchant and the purchaser of goods, between landlord and tenant, and between all persons standing in such a relation to each other, as imposes a duty upon one and creates a correspondent claim in the other. These trusts are immediate; they are executed or broken. But trusts properly so termed are executory; and there is a continuing confidence, which amounts to a constant acknowledgment of the debt, and repels the presumption that it has been satisfied or paid. These are the trusts, which we would consider in reference to the statute of limitations; and, it is apparent, that no argument can be drawn by way of analogy from trusts or duties of another character, where delay furnishes a strong presumption that they have been satisfied or never existed. Trusts of the latter kind are sometimes called constructive trusts, as distinguished from such as are direct. In these cases, there is an entire misapplication of the term. There is no trust; the duty is broken and damages in the form of interest are recovered for the breach.

In cases of executory trusts, it is the duty of the trustee to retain the property entrusted to him; and, as time is required for the performance of the trust, and, in some cases, a longer time than is provided for in the statute of limitations, manifestly no length of time can raise a presumption against the justice of the demand. The trustee is the agent

or servant of him, for whose benefit the trust is created, and represents his principal; and he cannot change the character of the relation, except by an open and adverse claim. Every bailment is a trust of this character. Whenever money is deposited and received, to be employed for certain uses, there is a duty and a trust, by the terms of which, the depositary is to retain the money and execute the trust. A debtor, whose term of credit has not expired, may be considered a trustee of this character, until the debt is payable. In these cases, there is not strictly speaking any other remedy than in a court of chancery, during the existence of the trust. If jewels or pictures are deposited with one as bailee, no action can be sustained at law; if an action of replevin is brought, the plea in defence is founded upon the trust. It avers that the possession did not commence in a wrong; and alleges facts which render the possession of the bailee consistent with the interest of the proprietor. Before an action can be brought, the character of the possession must be changed by a demand and refusal; and then an action of detinue or trover may be founded upon the new relation. The same facts, which constitute a bar to an action of replevin, may be replied to a plea of the statute.

When money is deposited on trust, an action at law cannot be sustained to recover it. To an action of indebitatus assumpsit, the trust may be pleaded and constitutes a complete defence. To sustain an action, there must be a demand and refusal, by which the trust is destroyed.

After the denial of the trust, if an action is brought at law, with an averment of demand and refusal, the bailee cannot plead the statute of limitations, and that no cause of action has accrued within six years from the time of the original deposit; such a plea would be demurrable. The time of the demand and refusal, or the time when a use and occupation, adverse to the interest of the bailee,

commenced, is the time when the presumption begins to exist, because then a foundation is laid for proceedings at law. There does not exist, in cases of trusts, a concurrent remedy at law and in equity. The existence of a trust is a sufficient plea to an action at law; the denial of the trust is an answer to a bill in chancery. There may be certain cases, when the party has an election of his remedy either in a court of chancery or at law, but by the election of one tribunal, he waives his resort to the other; the pendency of proceedings in either court constitutes a defence to remedial measures in the other.

There are no cases, where the only remedy is in chancery. In every case, resort may be had to a court of law, where from the nature of the subject, a denial of the trust gives an action; or if the claim is founded essentially in trust and confidence, a remedy is furnished in a court of law for a violation of the trust. No argument can be drawn from a supposed concurrent remedy at law, which is barred at law, and not therefore enforceable in chancery. There is no concurrent remedy; and no remedy, except such as is founded on a denial of the trust, or which exists for its violation. It is undoubtedly true, that the statute of limitations is regarded in equity, as a bar, equally decisive and binding, as in a court of law, and, that wherever a claim is barred at law, it cannot be aided in chancery; but the argument fails, because a trust suspends the action of a court of law. In bills for an account, chancery has a concurrent jurisdiction with courts of law. A court of chancery, in matters of account, acts as a court of law, to which its remedial provisions are in every respect analogous; but the trust, which exists where an action of account can be supported, implies no confidence and no duty except payment, and is of the class of constructive trusts. To a bill in chancery, demanding an account, there is therefore nothing to repel the presumption of payment. An

action of account may be brought and also a bill for an account, for the profits of an estate held in trust, as in the case of *Beckford v. Wade* (17 Vesey's Reports, 87), because these are not held in trust. The estate is held in trust, but the profits become a debt, and are payable according to the terms of the original trust deed. The capital stock of a bank may be held in trust; but the dividends are immediately payable; and, in certain cases, may support either an action of account, or a bill in equity for an account. Where there is a direct trust, no bill for an account can be supported, for the subject of the trust; and, if to such a bill the statute of limitations is pleaded, and there is a replication of the trust, it is repugnant to the bill itself. An averment of the trust also in the bill would render it demurrable.

We have already remarked, that trusts are without the operation of the statute, because there is implied in every trust an acknowledgment continually of the existence and justice of the claim. To a plea of the statute, a replication of an acknowledgment is a sufficient answer. To a bill in chancery, setting up a trust and demanding its performance, a plea of the statute is no answer. This plea is repelled by the matter of the bill, which states the nature of the demand of the plaintiff, and by anticipation renders inoperative the presumption founded upon the lapse of time. A plea of the statute in such cases, to be effectual, should aver an adverse claim, or a denial of the trust; and, that since such adverse claim or denial, the time for the statutory bar has elapsed. In the case of *Kane v. Bloodgood* (7 Johnson's Chancery Reports, 90), the effect of a plea of the statute, to a bill in chancery founded upon a trust, was considered. The case was decided in conformity to the principles which we have stated; but, in the discussion, chancellor Kent takes a view of the subject, and of the authorities applicable thereto, which we believe to be erroneous and incon-

sistent with his decision in the case itself. The case presented by the bill was substantially as follows: The plaintiff had become the proprietor of seven shares of stock in a certain manufacturing society, by assignment of the original owner, who was indebted to the company. The corporation retained the dividends, which had become payable on six of the shares, on the pretence, that they had accounted to him, and refused to account to the plaintiff; and they also retained the dividends on one of the shares, until the debt of the original proprietor should be paid. There was an adequate remedy at law, for the dividend adversely retained, and there could be no claim as for a trust. For the dividends accruing on the single share, the company admitted themselves trustees; and, although they were liable at law, they were trustees at the election of the plaintiff, having by their admission estopped themselves from denying that character. The circumstances of the case were presented fully in the bill, and the plea of the statute of limitations was unquestionably a bar to so much of the demand, as was founded upon the right to the dividends on the six shares. The corporation had always held these dividends adversely to the claim of the plaintiff. The dividends might have been recovered in an action at law. There was never any trust affecting these dividends; but if it were otherwise, it was ended by the demand and refusal. Chancellor Kent was of opinion, that so much of the plaintiff's bill as related to the six shares of stock was barred by the statute; and that the dividends received on the single share, and which were acknowledged to be held as security, until the debt should be paid, were protected by the trust. He entered into an elaborate argument to shew, that in all cases where a remedy might be had in a court of law, the statute of limitations took effect and barred the claim in equity. He supposes that there are certain cases, in which the courts have concurrent jurisdiction; that in all

cases of bailment upon trust, and of the deposit of money upon trust, an action may be brought at law, or relief sought in chancery, upon the trust itself; but this is an erroneous assumption. We have already remarked, that the existence of a trust is a bar to an action; and the existence of facts, constituting the foundation of an action at law, is an answer to a bill in chancery. Chancellor Kent maintains, that trusts merely equitable are exempted from the operation of the statute and no others; but he does not distinctly lay down any principle, by which trusts of this character may be distinguished; and he finds it necessary to deny the authority of certain cases, which support the principle which we have stated.

The earliest case is that of *Heath v. Henley* (1 Chan. Cases, 20; 2 Chan. Rep., 5;) in the 15th Charles II, in which the defendant was sued for an account of the moneys received by him as prothonotary of the King's Bench for and on behalf of the chief justice, who was the plaintiff's testator. The plea of the statute of limitations was overruled, on the ground that this was a trust and not within the statute. It is uncertain in this case, what was the nature of the trust. If the trust was no other than such as exists between debtor and creditor, in the ordinary case where money is received and the accountability acknowledged, then the statute was unquestionably a bar; and the case only proves, that when a trust is averred in a bill, it must be denied in the answer, and that a naked plea of the statute is not sufficient. It would seem, that in this case, however, the officer of the court was not a debtor, but merely a trustee, and as such bound to retain the sums in question, until they were demanded. This is not, however, important to this point; as the decision proceeded upon the assumption of a trust, created by the circumstances of the case, and appearing upon the pleadings. The next case is that of *Sheldon v. Weldman* (1 Chancery Cases,

26), 15th Charles II. The bill was brought for money delivered to the defendant by the testator, on an express trust, to be employed by him in compounding for the estate of the testator, sequestered by the government; and the plea of the statute was overruled, because the money was delivered on a trust. In lord Hollis's case (2 Ventris's Reports, 345), 26th Charles II., the sum of one hundred pounds was lent by lord Hollis's wife to be disposed of as she should direct; and the plea of the statute was overruled, because this was looked upon as a trust, the disposition of which was subject to the wife. Chancellor Kent denies the authority of these cases, because, as he maintains, there was a remedy at law; but it is most clear, that in these two latter cases, there was no remedy at law, except on a disaffirmance of the trust. Suppose by the terms of the trust and deposit, the money was to remain in the hands of the trustee, beyond the time of limitation in the statute, and then be employed for certain uses, with the accumulated fund. Could the trustee, after acting in conformity to his conventional character, during the whole time, protect himself by the statute against the performance of his executory agreement? Would length of time alone in such a case furnish any presumption, when time was of the essence of the contract. Time is always required in such cases, for the execution of the trust. It may be fixed and limited by the terms of the agreement, and at the expiration of the time, the trust is executed and closed, and then perhaps the statute may begin to bar. But in ordinary cases, the trust is indefinite in respect of time, and the relation continues until expressly revoked.

The argument of chancellor Kent is founded upon the existence of a concurrent remedy in the two courts. He admits, that the statute cannot be pleaded as a bar to trusts, which are merely the creatures of a court of equity,—but all the authorities adduced in support of his distinction are

bills for an account, which indeed are entirely analogous to the action of account, but in which there is no averment of a trust, and where the plea of the statute is not repelled by any circumstance, which, in a replication to the statute in an action at law, would take the case out of its operation. It was originally supposed, that the statute of limitations was not pleadable to bills in equity, and the effect of these decisions in bills for an account is, simply, that when the claim in equity is such, *prima facie*, as may be barred by a plea of the statute, in an action at law, then the same plea shall be received with the like effect in chancery. In the case of *Lockey v. Lockey* (Precedents in Chancery, 518), lord Macclesfield, in admitting the plea of the statute, in a bill for an account against one who had received the profits of the plaintiff's estate, whilst an infant, brought more than six years after he came of age, says, "this receipt of the profits of an infant's estate was not such a trust, as, being a creature of a court of equity, the statute shall be no bar to."

Chancellor Kent understands lord Macclesfield to mean, that the trusts which are not within the statute are only those which are the creatures of a court of equity, and the subject matter of which cannot be brought within the cognizance of a court of law; but lord Macclesfield was speaking of trusts, which can only be specifically executed in equity, because a court of law has no jurisdiction to enforce them. The claim on the trustee can only be enforced in a court of equity. This is true in reference to the trust on a bailment, or on the receipt of money for the purposes of a trust. Constructive trusts, on the contrary, are not within the jurisdiction of a court of equity; such is the character of all trusts, which are the subject of an action of account, or of a bill for an account. The trust is founded on the duty of a debtor to his creditor, namely, payment of the debt. In *Sturt v. Mellish* (2 Atkyns's Reports, 610), lord Hardwicke observes, that a trust is where there is such a confidence

between the parties, that no action at law will lie, but is merely a case for the consideration of the court of chancery; and he decided that the statute was a bar to a bill for an account, because there was no trust in that case. His meaning was, that the trust could not be the basis of an action at law, and not that there was no remedy at law, directly in favor of the *cestui que trust* against the trustee for a breach of his duty, although his doctrine was thus understood by the reporter Atkyns, who cites the authority of lord Hobart (1 Equity Cases Abr. 384), to show that an action may be sustained at law by the *cestui que trust*. Lord Hardwicke must be understood as speaking of the specific liability of the trustee for the execution of the trust, whenever a confidence exists, whatever other remedy existed; and it is undoubtedly true, that in the case then under consideration, there was no continuing confidence, as implied in a trust, and consequently, that the statute was a bar. Neither lord Hardwicke nor lord Macclesfield decided, that a distinction existed between cases where there was only a remedy in chancery, and those where adequate relief of a different kind might be furnished at law. The argument of chancellor Kent, therefore, which is founded upon the distinction supposed to be taken in these authorities, fails; and the other authorities, which he cites and relies upon, we believe are opposed throughout to the principle which he maintains.

In the case of *Lawley v. Lawley* (9 Modern Reports, 32), before lord Macclesfield, lands were settled by a will on trustees, in trust that the son's wife should receive the rents and profits of the lands, as the same were at that time let. The rents were afterwards greatly increased, and the wife after the death of her husband enjoyed the whole of the rents, making no distinction between the original and the increased rent. Several years after her death, her executor was sued by the devisee in tail, who was one of the *cestui*

que trusts, for an account of the surplus rents received by her and her executor, and the plea of the statute of limitations was overruled, because the estate at law was in trustees, and the executor was decreed to account for the improved rent. Now, in this case, it is observable, that the son's wife assumed the same liability to the other *cestui que trusts*, as the trustees themselves were subject to. She did not occupy adversely to them; her claim therefore could not bar the trustees. She came in under their authority, and enjoyed the increased rent by their consent. She was subject to the same liabilities as an assignee with notice, and was substantially a trustee. But she was also liable in an action at law to the trustees at their election, and the *cestui que trust* could, if he had chosen to disaffirm her trust, have proceeded at law for the additional rents in the name of the trustees, who represented the plaintiff. It was decided that the claim was not barred in this case by the statute of limitations. Chancellor Kent supposes that the plaintiff was not barred, because he could not maintain an action at law in his own name; but the bar operated *in rem*, and not as creating a personal disability, if it could have any effect. By barring the claim of the trustees, the *cestui que trust* would also have been barred, as was truly observed by sir William Grant (2 Merivale's Reports, 360), when commenting upon this case. The true reason, why the statute had no operation in this case, was the existence of a trust, although an action at law might have been supported; and we consider the case as conclusive authority in support of the principle which we maintain.

In *Prince v. Heylin* (1 Atkyns, 493), lord Hardwicke decided, that the statute was a bar to a demand by one tenant in common against another, which is expressly mentioned in the statute of limitations; but he was of opinion, that the statute did not apply to joint tenants and parceners, because of the trust; and yet an action of account may be sustained

by the provisions of the statute of Anne, chapter 16, as well for joint tenants as tenants in common. Here then is a case, where the remedy at law is perfect, and yet because of the trust, relief is also given in equity. The case is questioned by chancellor Kent, but is conformable to the whole course of authority.

In *Pomfret v. Windsor* (2 Vesey, 472), the principle was acknowledged and acted upon. In *Hovenden v. lord Annesley* (2 Scho. & Lef. 607), lord Redesdale acknowledged the doctrine laid down by lord Macclesfield in *Lockey v. Lockey*. He was of opinion, that courts are bound to yield obedience to the statute of limitations upon all legal titles and legal demands; and that if a person having a legal title and a legal demand resorts to equity, the same period of time which would bar him at law, shall bar him also in equity. This is the true principle. If the party has only a legal title and legal demand, and that is barred at law, he shall not be permitted to revive it by resorting to a court of equity. But very different is the case, if his demand is founded upon a trust, which prevents the statute from taking effect upon the legal claim, when the demand and title are merely equitable. There must be an actual trust, a confidence founded on the relation subsisting between the parties, not merely a constructive trust, founded upon a mere indebtedness. Lord Redesdale states the case of a lessee for years, whose possession is no bar to an ejectment, after the expiration of his term, because his possession is according to the right of the party against whom he seeks to set it up; and yet if the lease had been founded upon a condition, giving a right of entry on failure of payment, there might have been a remedy strictly legal, if the lessee had chosen to enforce it.

In the case of *Beckford v. Wade* (17 Vesey's Reports, 87), the master of the rolls remarks, that the statute has no direct operation upon trusts, for which there was no remedy but in courts of equity. Chancellor Kent does not understand

this remark as applying to all trusts, but only to such for which no other remedy existed than in a court of chancery; but the remark has application, as we conceive, to all trusts; none of which can be enforced as such at law. Chancellor Kent relies upon the case of *Cholmondely v. Clinton* (2 *Mervivale's Reports*, 360), as supporting his views. This was the case of a mortgage, where the mortgagee was not in possession, but for more than twenty years received the interest of the mortgage debt from the defendant, as if he had been entitled to the equity of redemption. The plaintiff, at the end of twenty years, claimed to be rightfully entitled to the equity of redemption, and to the defence of the statute of limitations, replied, that the estate in the constructive possession of the mortgagee was a trust protected for the rightful *cestui que trust*, and such was the decision of the court. It is observable, that this was considered by sir William Grant, the master of the rolls, to be taken out of the statute, by the trust which affected the subject of the controversy, and not by any personal trust or confidence between the parties. Whether there was or not an actual disseisin of the plaintiff, he had an election for the purpose of his remedy so to consider it, and the title might have been determined at law by any possessory action.

The decision is therefore opposed to the distinction of chancellor Kent, that equitable trusts only are exempted from the operation of the statute, and when there is no resort to law. This case is only worthy of remark, because it is one of the authorities, relied upon in the case of *Kane v. Bloodgood*, as the decree was afterwards reversed by sir T. Plumer, master of the rolls, (whose decision was confirmed by the house of lords), on the ground that there was no trust as between the claimants, and that the trust existing between the mortgagee and him who was rightfully entitled to the equity of redemption did not affect the question of title between other parties. It is settled in England,

that the statute does not apply to legacies, on the ground of a trust, and yet an action may be brought at law, for a legacy, after the assent of the executor, which clearly shows, that all trusts are without the operation of the statute. A charge upon the land cannot be barred, not because there is no remedy at law, but because the charge is in the nature of a trust. There is no adverse possession; and he to whom the rent is due is seised of the rent charge.

The learned chancellor, in revising his opinion in the case of *Decouche v. Savetier* (3 Johnson's Chancery Reports, 216), expresses a doubt of its correctness; but although an action at law might be brought, we maintain that because of the trust, the statute of limitations could never bar the legal remedy, and that a court of chancery will also enforce the execution of the trust. The executor is created a trustee by the will, and can only be discharged by executing the trust, or by the spiritual court, or the court of probate. The same principle, denied in the case of *Kane v. Bloodgood*, was also very clearly laid down in the case of *Coster v. Murray*, (5 Johnson's Chancery Reports, 522). In that case, there was a remedy at law, but there was a trust averred; and to this averment, the plea of the statute of limitations was no answer. In the case of *Kane v. Bloodgood*, it is to be observed, that one part of the claim was presented not with the averment of a trust—but with a direct admission of the adverse claim set up by the defendant; as it respected this, therefore, the remarks of chancellor Kent were extrajudicial. The bill was suicidal. The plea only reiterated the language of the bill, but another part of the claim set forth a trust—(for the single share of stock and its dividends); and, it is very remarkable, that after the elaborate argument in support of a principle, which conflicts with his decision, the plea of the statute was overruled, so far as it related to this part of the bill, not because the subject thereof was merely an equitable trust,

nor because there was no remedy at law, but on the ground that there were circumstances stated in the bill, which took the case out of the statute, and that the plea was not accompanied with an averment or answer destroying the force of these circumstances. But the averment of a trust is certainly equivalent to the averment of the various circumstances, which take the case out of the statute; and we conceive that this part of the opinion (p. 135), which seems to have been the result of more serious deliberation, supports the cases which occurred in chancery in the reign of Charles the Second, (which in another part of the opinion are questioned); whether a remedy existed at law or not, it also supports the cases of *Decouche v. Savetier*, and of *Coster v. Murray*.

S. F. D.

ART. VI.—RAY'S MEDICAL JURISPRUDENCE OF INSANITY.

A Treatise on the Medical Jurisprudence of Insanity. By I. Ray, M. D. Boston: Charles C. Little and James Brown. 1838.

WE have seldom engaged in the performance of a duty, either more agreeable in itself, or more gratifying to our pride of country, than that of making our readers acquainted with Dr. Ray's *Treatise on the Medical Jurisprudence of Insanity*; a work, which, whether we regard it as a contribution to the cause of humanity, or as an attempt to embody the results of modern science, in relation to mental disease and its incidents, is equally worthy of our admiration.

"Insanity," to use the language of a late writer in the *Foreign Quarterly Review*, "in its most comprehensive sense, may be considered an ineptitude for conducting one's-

self in the ordinary affairs of life and its relations with society." This ineptitude may be either total or partial, constant, temporary or intermittent; and, whenever it exists in an individual, it, in the first place, either wholly abrogates or materially modifies the relations before subsisting between him and society, or other individuals, and, secondly, it creates a new relation growing out of the fact of his mental disease. The laws, which assume to regulate "the ordinary affairs of life and its relations with society," are founded in the supposition, that the subjects of their regulations are of sound mind, or, in other words, that they are competent to conduct themselves in those affairs and relations; and, consequently, when one becomes disordered in mind, to the point of being incompetent to the ordinary affairs and relations of life, it follows of course, that all the legal regulations, to which he was before subject, must undergo corresponding changes and modifications; in addition to which, it becomes necessary also to provide by law for the new relation, which the fact of insanity creates between the subject of it and society. The aggregate of all these legal modifications and regulations, and the knowledge and proper application of them in practice, constitute the Medical Jurisprudence of Insanity.

This subject, notwithstanding its very great and manifest importance, has hitherto received but little attention. Dr. Ray remarks in his preface:

"In general treatises on legal medicine, this branch of it has always received a share of attention; but the space allotted to it is altogether too limited to admit of those details, which can alone be of any really useful service; and it is one of those branches on which the author is usually the least qualified by his own experience, to throw any additional light. Insanity itself is an affection so obscure and perplexing, and the occasions have now become so frequent and important, when its legal relations should be properly understood, that an ampler field of illustration and discussion is

required for this purpose, than is afforded by a solitary chapter in works of this description." p. vii.

The legal rules, by which the relations of the insane are regulated, have been predicated upon the most common and obvious of the external phenomena of mental disease; and, if these were constant, and certain, and well known, the medical jurisprudence of insanity would perhaps be attended with comparatively little difficulty. But several causes have operated to render this a difficult subject. In the first place, since the establishment of the rules of the common law relating to insanity, the external phenomena of that affection have been very much, and indeed almost entirely changed, by the different mode in which it has been considered and treated. Dr. Ray alludes to this circumstance, in the following passage, in which he describes the treatment usually bestowed upon the subjects of mental disease, until within a recent period :

"Instead of the kindness and care, so usually manifested towards the sick, as if it were a natural right for them to receive it; instead of the untiring vigilance, the soothing attention, the lively solicitude of relatives and friends; the patient, afflicted with the severest of diseases, and most of all dependent for the issue of his fate on others, received nothing but looks of loathing, was banished from all that was ever dear to him, and suffered to remain in his seclusion, uncared for and forgotten. In those receptacles, where living beings, bearing the image and superscription of men, were cut off from all the sympathies of fellow-men, and were rapidly completing the ruin of their immortal nature, there were scenes of barbarity and moral desolation, which no force of language can adequately describe. The world owes an immense debt of gratitude to the celebrated Pinel, who, with an ardour of philanthropy that no discouragement could quench, and a courage that no apprehension of danger could daunt, succeeded, at last, in removing the chains of the maniac, and establishing his claims to all the liberty and comfort which his malady had left him capable

of enjoying. With the new aspect, thus presented, of the moral and intellectual condition of this portion of our race, the medical jurisprudence of insanity became invested with an interest, that has led to its most important improvements." § 1.

Another circumstance, which has contributed to the difficulty of this subject, is, that the scientific knowledge of insanity has been making continual progress for the last half century, while the popular notions of it have remained nearly or quite stationary. If we compare what is now known of insanity with what was known of it in 1791, when Pinel, "the Howard of the insane," commenced his labors, we shall find as great a difference, as we find in the treatment of the insane. It is certainly not more than fifty years, since, as Dr. Ray remarks (§ 1), insanity was considered, even by men of learning and science, "as resulting from a direct exercise of divine power, and not from the operation of the ordinary laws of nature, and was thus associated with mysterious and supernatural phenomena, confessedly above our comprehension." It was consequently deemed to be incurable, or, at least not susceptible to the influence of ordinary curative means. Now, the whole aspect of the matter is changed. Hospitals, private and public, for the relief and cure of the insane, have been every where established; and the statistics of these institutions demonstrate, beyond all question, that insanity, like other diseases, admits of perfect cure, or, at least, of very great relief, especially if subjected to proper medical treatment in its early stages.

To the causes of difficulty above stated, we may add a third, which has operated no less powerfully than either of the others. We allude to the fact, that the principles of law, by which the relations of the insane are regulated, have been practically applied and administered, as it was natural if not unavoidable they should be, according to the popular notions rather than the scientific knowledge of the

subject. On this point, we have no disposition nor is it necessary to enlarge. To those, whose knowledge of insanity is not advanced beyond the common law standard, if there be any such, we could say little more than to recommend to them, to investigate and inquire for themselves; and, to those who know what the state of scientific knowledge on this subject now is, any thing we could say would be superfluous.

It seems to have become absolutely necessary, therefore, not perhaps to change any of the rules of law regulating the relations of the insane, but to put it in the power of those who are entrusted with their administration, so to modify and apply them, as to correspond with the improved state of our knowledge of insanity. This is the design of the present work, and is thus announced by the author, in his preface :—

“The main object which he proposed to himself, was to establish the legal relations of the insane in conformity to the present state of our knowledge respecting their disease. In furtherance of this object, he has given a succinct description of the different species of insanity, and the characters by which they are distinguished from one another, so that the professional student may have some means of recognising them in practice, and thence deducing, in regard to each, such legal consequences as seem warranted by a humane and enlightened consideration of all the facts. He is well aware that he has presented some views that will not, at first sight, meet with the cordial assent of all his readers. He can only say in justification, that they have appeared to him to be founded on well-observed, well-authenticated facts, and that as such, it was an imperative duty required by the claims of humanity and truth, to present them in the strongest possible aspect. Before being condemned for substituting visionary and speculative fancies, in the place of those maxims and practices which have come down to us on the authority of our ancestors, and been sanctioned by the approval of all succeeding times, he

hopes that the ground on which those alleged fancies have been built, will be carefully, candidly, and dispassionately examined." Preface, p. xi.

This undertaking, the difficulty of which is equalled only by its importance, has been accomplished by Dr. Ray, in a manner highly creditable to himself, and, which, we think, ought to satisfy every humane and enlightened inquirer after truth.

When lawyers and judges have hitherto undertaken to look beyond the mere phenomena of insanity, and to inquire what it really is, they have at once embarked on a boundless sea of speculation and conjecture; and, in general, the only result of their voyaging has been, that insanity is not sanity. If any one doubt on this point, let him read the introduction and the first three chapters of Mr. Shelford's compilation, and he will probably be perfectly satisfied, that our assertion is not exaggerated. A writer in the *Law Magazine*, for January, 1830, thus sums up his experience in this matter: "We are stopped at once by the absolute want of all data, perplexed at the outset by this simple, but, we fear, unanswerable query, what is insanity? Locke long ago informed the world, that it was 'that state of mind which is not reason,' and other writers have described it by negatives; but, as far as our researches have extended, no one has yet been found to declare what *it is*, correctly, or even intelligibly, and, of all the accounts given of it, no two at all resemble one another. Judges and doctors of medicine have alike failed and differed; but the former, as the more confident, have been the more surpassing in absurdity." If these representations are founded in truth, those of our readers, who shall coincide with us in opinion, that Dr. Ray has answered this puzzling query, both correctly and intelligibly, will also agree with us that science and humanity are deeply indebted to him. We proceed now to an analysis of his work.

In an introductory chapter, entitled "Preliminary Views," the judicial opinions and practices that have hitherto prevailed relative to insanity are reviewed; and the several tests, that have at different times been judicially suggested or adopted, are examined and criticised. These tests, viz.; the knowledge of good and evil,—and of right and wrong,—the power of design,—and delusion,—are all shown to be fallacious; and the conclusion is drawn, that "there is no single character, which is not equally liable to objection." The preliminary views also contain some very judicious remarks and important suggestions, relative to the mode of investigating and establishing the fact of insanity, to which we shall have occasion to revert hereafter. We insert the concluding paragraph of this part of the work.

"If the above hasty review of the judicial opinions and practices, that have hitherto prevailed relative to insanity, have left the impression, that this disease is as yet but imperfectly understood, as well in the medical profession as out of it, an explanation of this fact may perhaps be demanded; but, as it would be hardly relevant to the present purpose, to enter largely into a discussion of this point, nothing more will be attempted than merely to indicate what seems to have had the principal share in producing it. To explain the little progress, comparatively speaking, that has been made by medical men in the knowledge of insanity, it is too much the fashion to allege, that they have neglected the study of mental philosophy, or that of mind in the healthy state, which is indispensable to correct notions on the disordered condition of mind. So far, however, is the fact here indicated from being true, generally, that one cannot hesitate to say, that the result in question has been owing to the undue account, that physicians have made of the popular philosophy of mind, in explaining the phenomena of insanity, and that they have failed, in consequence of studying metaphysics too much instead of too little. While it is admitted, that the knowledge of healthy structure and functions is necessary to a thorough understanding of diseased structure

and functions, there is every reason to believe that the converse of the proposition is equally true ; neither can be successfully studied independently of the other. In the prosecution of psychological science, this latter truth has been almost entirely disregarded, and therefore it is, that we see the metaphysician looking for his facts and his theories in the healthy manifestations of the mind, and directed in his course solely by his own self-consciousness, while the student of insanity, after collecting his facts with commendable diligence and discrimination, amid the disorder and irregularity of disease, resorts to the theories of the former, for the purpose of generalizing his results, instead of building upon them a philosophy of his own. Metaphysics, in its present condition, is utterly incompetent to furnish a satisfactory explanation of the phenomena of insanity, and a more deplorable waste of ingenuity can hardly be imagined, than is witnessed in the modern attempts to reconcile the facts of the one with the speculations of the other. In proof of the truth of these assertions, it is enough barely to mention, that the existence of monomania, as a distinct form of mental derangement, was denied, and declared to be a fiction of medical men, long after it had taken its place among the established truths of science ; because, probably, it was a condition of mind not described by metaphysical writers. All this, however, is in accordance with a well-known law of the human mind, which resists important innovations upon the common modes of thinking, till long after they shall have been required by the general progress of knowledge. The dominant philosophy has prevailed so long and so extensively, and has become so firmly rooted in men's minds, that they who refuse to take it on trust and seriously inquire into its foundations, and after finding them too narrow and imperfect, are bold enough to endeavor to remedy its defects by laying foundations of their own, are stigmatized as visionaries and overwhelmed with ridicule and censure. The only metaphysical system of modern times, which professes to be founded on the observation of nature, and which really does explain the phenomena of insanity, with a clearness and verisimilitude, that strongly corroborate its proofs, was so far

from being joyfully welcomed, that it is still confined to a sect, and is regarded by the world at large, as one of those strange vagaries, in which the human mind has sometimes loved to indulge. So true it is, that, in theory, all mankind are agreed in encouraging and applauding the humblest attempt to enlarge the sphere of our ideas, while, in practice, it often seems, as if they were no less agreed to crush them, by means of every weapon, that wit, argument, and calumny, can furnish. In the course of this work, the reader will have frequent occasions to see how the popular misconceptions,—which are too much adopted by professional men, of the nature of various forms of mental derangement, have been produced and fostered by the current metaphysical doctrines, and thus may have some means of judging for himself, how far the imperfect notions of insanity, that are yet prevalent, may be attributed to the cause above assigned.” § 30.

The body of the work is divided into twenty-five chapters.

The first chapter, on mental diseases in general, contains an explanation of the author's views of the nature and particular seat of mental disease, and a division and classification of the whole subject. The manifestations of the intellect, and of the sentiments, propensities and passions, are connected with and dependent upon the brain; consequently, the abnormal conditions of these powers are equally connected with abnormal conditions of the brain; and, therefore, insanity, or a morbid manifestation of the affective and intellectual powers, is the result of cerebral disease. We are aware that this doctrine does not meet with the universal approbation of men out of the medical profession, and perhaps not of all the members of that profession; but, if the writer, whose definition of insanity we quoted in the commencement of this article, is to be relied on, the medical unbelievers, on the other side of the Atlantic, at least, are so exceedingly few in number, as not to be noticed at all, in the mass of scientific men.

"The popular opinion in this country [England] and the continent is, that it [insanity] is a disease of the mind itself, independent of any corporeal malady ; but with the scientific men of both countries, this is entirely abandoned, the opinion being that it depends upon diseases of the brain and its membranes." *Foreign Quarterly Review*, for October, 1837.

Dr. Ray arranges the various phenomena included in the general term insanity, or mental derangement, under two divisions founded on two very different conditions of the brain, namely : first, where there is a deficiency of the ordinary development of this organ ; and second, where there is some lesion or injury of its structure. The first division includes idiocy and imbecility, which differ from each other only in degree. The other division includes all the various affections embraced under the terms mania and dementia. The first of these affections, mania, is characterized by an exaltation of the faculties, and may be confined to the intellectual, or to the affective powers, or it may involve them both ; and these powers may be generally or partially deranged. Dementia, on the contrary, depends on a more or less complete enfeeblement of the faculties, and may be consecutive to injury of the brain, to mania, or to some other disease, or may be connected with the decay of old age.

The second chapter is devoted to idiocy, the third to imbecility, and the fourth to the legal consequences of mental deficiency, or of that branch of insanity, which depends upon a want of the ordinary development of the brain. Under this class are included not only those persons, in whom the intellectual powers are deficient, but also those in whom there is a great deficiency if not an utter destitution of the higher moral powers, the intellectual perhaps not being directly affected in any sensible degree. This branch of the subject is of great interest and importance, and is discussed by Dr. Ray in a clear and convincing

manner. We have already published his views, at considerable length, and illustrated by several cases, in our journal for January, 1837, under the title of "Imbecility in Connexion with Crime," to which our readers are referred.

The fifth chapter, on the pathology and symptoms of mania, contains a statement and illustration of the two propositions, on which the whole doctrine rests, first, that mania is a disease of the brain, and, second, that in its various grades and forms, it observes the same laws as diseases of the other organs. This chapter is concluded by a general view of the mode, in which the subject of mania is treated by our author.

"The mental disorders are of course as numerous and various as the mental constitutions of the insane themselves ; and to consider any particular association of them as characteristic of the state of mind called mania, would be only to blend things together that have no uniform nor necessary relations to one another ; and would convey no more really valuable information, than it would to marshal forth every symptom that has at any time been observed in the countless disorders of digestion, as *the* symptoms of diseased stomach. The only use which the physician makes of the latter is to refer them as they occur, to some particular derangement of that organ, and thus establish the ground for an appropriate and efficient treatment. There is no reason, why the same process should not be pursued in mania ; and it is because a different one has been followed, that the common notions of this disease are so loose and incorrect, as not only to be of little service in judicial discussions, but absolutely in the way of arriving at just and philosophical conclusions. To furnish any light on the subject, it would be our duty to analyze the various phenomena of mania, associate them by some natural relations, and refer them, as far as our knowledge will permit, to particular faculties. It is proposed therefore, following this idea as closely as possible, to consider mania as affecting either the *intellectual*, or the *affective* faculties ; meaning by the former, those which make us acquainted with the existence and qualities of external

objects and the relations of cause and effect, and conduct us to the knowledge of general truths; and by the latter, those sentiments, propensities and passions necessary to man as a social and accountable being. It is not intended to convey the idea that mania is invariably confined to one or the other of these two divisions of our faculties; for though they may sometimes be separately affected, the one presenting a chaos of tumult and disorder, while the other apparently retains its wonted soundness and vigor, yet more frequently, they are both involved in the general derangement. But unless we study these disorders separately, and recognise their independent existence, and this effect it is the tendency of the above classification to produce,—we never shall be able to refer them to their true source, nor discover their respective influence over the mental manifestations.” § 96.

The sixth chapter, in pursuance of the plan announced in the preceding extract, treats of intellectual mania, in two sections, under the divisions of general and partial. The first involves all or the greater part of the operations of the understanding; the latter is confined to a particular idea or train of ideas. In the first section, the author refutes the common notion, that insane persons reason correctly from false or wrong premises.

“The doctrine that insanity consists in false judgments, conveys no more satisfactory notion of its essential characters, for though there most certainly is false judgment in every case of insanity, it is far from being confined to this condition of the mind. Every one is occasionally guilty of some gross error of judgment, on which he may reason accurately and arrive at specious conclusions, without being considered at the time, madder than his neighbors. Locke, as if strongly impressed with the curious fact of the coexistence of absurd fancies with the power of reasoning smartly and pertinently to a certain extent, which is occasionally observed in the insane, remarked that they did not seem to have lost the faculty of reasoning, ‘but having joined together some ideas very wrongly, they mistake them for truths, and they err as

men do that argue right from wrong principles.' If Locke had possessed any practical acquaintance with insanity, if he had even spent an hour in a well managed hospital for the insane, he never would have adopted this opinion, for nothing can be farther from the truth, than the idea that generally madmen reason correctly from wrong premises. The lady who imagined that a tooth which a dentist had removed, had slipped from his fingers and stuck in her throat, and insisted that she could not swallow a morsel, while she ate and drank heartily, was as wrong in her conclusion as she was in her premises ; and the man who, like Bellingham, imagines that the government has been culpably negligent of his private interests, and thence proceeds to take the life of a person whom he believes to be perfectly innocent, in order that he may have an opportunity of bringing his affairs before the country, errs in every stage of his reasoning. Indeed, it is matter of common observation, that maniacs display their insanity, not more in the delusions which they entertain, than in the course they pursue in order to accomplish their objects." § 100.

Partial intellectual mania was formerly denominated melancholia, on the supposition that it was always attended by dejection of mind, and gloomy ideas ; until Esquirol demonstrated the impropriety of the application, by showing that the ideas are not always gloomy, but frequently of a gay and cheerful nature. This writer substituted the term monomania, which is now in general use, and, besides partial intellectual mania, includes also a class of cases treated of by Dr. Ray under another head. The simplest form of partial intellectual mania is that in which the patient has imbibed some single notion, contradictory to common sense and to his own experience, and which seems to be, and sometimes no doubt is, dependent on errors of sensation. The case of the Rev. Simon Browne, is one of the most curious instances of this form of mental disease.

"For many years before his death, he entertained the belief that, he had lost his rational soul,' though during that time he

evinced great ability both in his ordinary conversation and in his writings. Having discontinued all public or private worship, he explained to his friends, that 'he had fallen under the sensible displeasure of God, who had caused his rational soul gradually to perish, and left him only an animal life in common with brutes; that it was therefore profane in him to pray, and incongruous to be present at the prayers of others.' In a book of some merit which he dedicated to the queen, he speaks of himself as 'once a man; and of some little name; but of no worth, as his present unparalleled case makes but too manifest; for by the immediate hand of an avenging God, his very thinking substance has for more than seventeen years been wasting away, till it is wholly perished out of him, if it be not utterly come to nothing.'" § 105.

Moral mania, the other branch of the general division of mania, forms the subject of the seventh chapter. This form of insanity consists in a morbid perversion of the natural feelings, affections, inclinations, temper, habits, and moral dispositions, without any notable lesion of the intellect or knowing and reasoning faculties, and particularly without any maniacal hallucination. Dr. Ray considers it under the two divisions of general, where the whole moral nature presents a scene of chaotic disturbance, and partial, where one or two only of the moral powers are perverted. The subject of moral mania is of incalculable importance in a medico-legal point of view, and, as such, is very fully, ably and satisfactorily treated by Dr. Ray. Partial moral mania is thus described:

"In this form of insanity, the derangement is confined to one or a few of the affective faculties, the rest of the moral and intellectual constitution preserving its ordinary integrity. An exaltation of the vital forces in any part of the cerebral organism, must necessarily be followed by increased activity and energy in the manifestations of the faculty connected with it, and which may even be carried to such a pitch as to be beyond the control of any other power, like the working of a blind, instinctive im-

pulse. Accordingly, we see the faculty thus affected, prompting the individual to action by a kind of instinctive irresistibility, and while he retains the most perfect consciousness of the impropriety and even enormity of his conduct, he deliberately and perseveringly pursues it. With no extraordinary temptations to sin, but on the contrary, with every inducement to refrain from it, and apparently in the full possession of his reason, he commits a crime whose motives are equally inexplicable to himself and to others. The ends of justice require that this class of cases should be viewed in their true light; and while it is not denied that their similarity to other cases in which mental unsoundness is never supposed to have existed, renders such a view difficult, yet this very difficulty is a fresh reason for extending our inquiries and increasing our information." § 120.

In the remaining paragraphs of the section on partial moral mania, Dr. Ray notices at considerable length those of its forms, which manifest themselves in an irresistible propensity to theft, lying, sexual indulgence (erotic mania), incendiarism, and the destruction of life. The last mentioned form of the disease "consists in a morbid activity of the propensity to destroy, where the individual, without provocation or any other rational motive, apparently in the full possession of his reason, and oftentimes in spite of his most strenuous efforts to resist, imbrues his hands in the blood of others; oftener than otherwise of the partner of his bosom, of the children of his affections, of those, in short, who are most dear and cherished around him (§ 133). This form of moral mania was first described by Pinel; and, though its existence as a distinct form of the disease was long doubted, it has been subsequently admitted by the principal writers on insanity. Among these, Esquirol deserves to be particularly mentioned. When the doctrine was first started, he avowed his disbelief in the existence of homicidal insanity unconnected with other mental alienation; but he afterwards retracted this opinion, and, according to Dr. Ray

(§ 134, note), has published the very best contribution to our knowledge of the subject. It is worthy of remark, too, that while Dr. Gall, in one part of Europe, was observing and verifying the existence of the propensity to destroy, in connexion with a particular development of the cerebral organism, Pinel, Esquirol, and others, in another, were at the same time, and probably in ignorance of his discoveries, observing and verifying the diseased manifestations of the same propensity. Dr. Woodward, the superintendent of the State Lunatic Hospital, at Worcester (Mass.), was the first, we believe, who, in this country, called the public attention to homicidal mania, as a distinct form of insanity. Dr. Ray illustrates it at great length, and with a variety of interesting cases, selected as he remarks from a much greater number; some of which, at least, if our limits would permit, we should lay before our readers. This section is concluded by an analysis and comparison of the circumstances respectively attending maniacal homicide and wilful murder, which, in our judgment, ought to dissipate the fears of all, who imagine that the doctrine of homicidal insanity is a mere device, got up under the impulse of a misplaced humanity, to cheat the law of its destined victim.

In the eighth chapter, Dr. Ray considers the legal consequences of the several forms of mania, described in the two preceding chapters. The effect of these different kinds of insanity, upon the power of the party to contract marriage, to dispose of property by will or otherwise, and, in general, to control and manage his affairs, is admirably discussed and explained. The legal responsibility of one laboring under partial moral mania, for acts committed during the paroxysm, and, which, if committed by a person of sound mind, would be criminal, receives a large share of the author's attention. It is in the doctrines, which he advances on this point, that Dr. Ray, in common, however, with all the other writers, who acknowledge the existence of moral insanity, will be likely

to meet the most opposition ; and, more particularly, in the application of these doctrines to cases, where the disease, without any previous warning, first manifests itself, or, to use the technical term, explodes, in the very act which is the subject of inquiry. The following case, in which the act in question was the first intimation of the disease, but in which there happened to be conclusive evidence of its previous existence, forcibly illustrates the doctrine of moral insanity, and strongly enforces the danger of hastily pronouncing an act not to be done under an insane impulse, because there does not happen to be any external evidence of the previous existence of the disease.

“ Another reason for delay is, that insanity is sometimes so completely veiled from observation, as never to be suspected even by the most intimate associates of the patient. An instructive case is related by Georget, in which the existence of insanity, though of several years duration, was not recognised till after the death of the subject. The circumstances were briefly these. Bertet, a revenue-officer, exercised the duties of his office for three years, in the manufactory of M. M. Ador and Bonnaire, at Vaugirard, where he was only noticed for his unaccommodating disposition, melancholic temperament and fondness for seclusion. One day while M. Ador was conversing with some of the workmen, he was requested by Bertet to affix his signature to certain papers. He proceeded to his room for this purpose, and while in the act of writing, was shot dead by Bertet, who immediately afterwards blew out his own brains. Among his papers were found several addressed to the advocate-general, bearing the most singular titles, such as *my last reflections*, *my last sighs*, in which he declared that he had been poisoned several years before, and gave a minute account of the numerous remedies he had ineffectually used, insisting at the same time that his head was not turned, that he acted deliberately, and giving very coherent reasons to prove it. He announced that four victims were required, namely, the two heads of the establishment, a woman who was living in it,

and his old housekeeper, and that in case he should be contented with one, he would leave to justice the charge of obtaining the others. Some of these papers he finishes with saying, 'To day my pains are less acute,—I feel better,—my vengeance is retarded,' or 'my pains are renewed—with them my thoughts of vengeance.' Among other wild fancies, he made a description of the funeral monument to be raised to one of his victims, which was to be a gibbet covered with figures of instruments of punishment. He also described his own funeral procession. He wished the four corners of the pall to be carried by the four persons above-mentioned, in case he should not have sacrificed them; that the advocate-general should follow the *cortege*; and that when it reached the cemetery, the latter should prepare a large ditch in which they should first cast him, Bertet, and then the four pall-bearers. In another paper, he said he designed for each of his victims two gilt balls, as an emblem of their ambition and thirst of gold, and some pulverized cantharides, as an image of the torments which he suffered. Bertet had never shown any signs of mental alienation in his official letters and reports. He was sometimes abstracted and loved to be alone, but his disposition, in this respect, had been of long standing and seemed to be owing to the state of his health, of which he was constantly complaining, though judging from his exterior he seemed to be well enough. He had always discharged the duties of his office satisfactorily, and, by his own solicitation, had just before obtained a more profitable place. Had not Bertet recorded his insane fancies, but, failing in his suicidal attempt, had been brought to trial for the murder of M. Ador, the plea of insanity would have fallen on the most incredulous ears, and he would have paid the last penalty of the law. In a state of confinement and seclusion, however, nothing but time would have been necessary to reveal the true nature of his case." § 194.

Dementia and its legal consequences form the subject of the ninth and tenth chapters. This form of insanity is attended with a general enfeeblement by disease of the moral and intellectual faculties, which were originally sound and

well developed; and is characterized by forgetfulness of the past, indifference to the present and future, and a certain childishness of disposition. Dementia is something more than that loss of mental power, which results from the mere natural decay of the faculties; it is also attended with those pathological changes, which are essential to the production of insanity. The mind is not only feeble but deranged. The legal consequences of dementia are important to be understood, in reference particularly to the capacity of the party to perform various civil acts, such as making a will, testifying, &c.; the very character of the disease itself precluding the subjects of it from the commission of acts, which might be brought in question before a criminal tribunal.

Febrile delirium and its legal consequences are noticed in the eleventh and twelfth chapters. This form of insanity is only an accidental symptom of some other disease. It is important to be understood, however, in reference to the validity of testamentary and other dispositions of property, made during sickness, which are often contested on the ground of incapacity, especially where there is any suspicion, real or pretended, of improper influence having been used.

The thirteenth chapter treats of the duration and curability of madness. The fourteenth, on lucid intervals, was published entire in the last January number of our journal.

The first fourteen chapters of Dr. Ray's work constitute that part of it, in which the nature of mental disease, and the different forms which it assumes are considered. The length to which this article has already extended, and our desire to touch briefly on one or two topics connected with the general subject, will preclude us from doing more than to give the titles of the remaining eleven chapters. They treat of the incidental but very important matters of simulated insanity, concealed insanity, suicide and its legal con-

sequences, somnambulism and its legal consequences, simulated somnambulism, the effect of insanity on evidence, drunkenness and its legal consequences, and interdiction.

One of the most important topics, connected with the medical jurisprudence of insanity, is the investigation of the fact of mental disease, whether with a view to settle the character of some act, or to the taking of measures for the restraint of the individual himself, and his interdiction from the custody and management of his affairs. The mode of investigation, invariably pursued in this country, is, we believe, by the examination of witnesses, who, from their being of the medical profession, or from their experience in the care and government of the insane, are supposed to be skilled in a knowledge of the manifestations of the disease. It is competent, however, for the parties to call such witnesses (medical or otherwise), as they please; and the only security, therefore, under this system, that ignorance and impudence shall not prevail over experience and knowledge, is the more than doubtful one of a cross examination. But this instrument is equally available on both sides; and, though it may be a very good mode of trying a witness's recollection of facts, and the value of his testimony may perhaps be very well estimated by his ability to undergo the mental torture which it inflicts; yet, sure we are, that this is not the case, where the testimony of the witness is to his own opinion, formed of a great variety of elements, most or perhaps all of which it is manifestly impossible for him to subject to the scrutiny of the court and jury. This mode of ascertaining the existence of insanity is very properly animadverted upon by Dr. Ray, and its manifold inconveniences, not to say, inadequacy to attain the end in view, distinctly pointed out. Dr. Ray is of opinion, that, whenever the question of insanity is raised, a commission should be appointed by the court, to examine and report upon the state of the party. The commissioners should be selected

by the court, and their functions should correspond with those of *experts* in the French law. In reference to this matter, we commend the following suggestions to the serious attention of our readers :

“ If a particular class of men only are thought capable of managing the treatment of the insane, it would seem to follow, as a matter of course, that such only are capable of giving opinions in judicial proceedings relative to insanity. True, in important cases, the testimony of one or more of this class is generally given ; but it may be contradicted by that of others utterly guiltless of any knowledge of the subject, on which they tender their opinions with arrogant confidence—for ignorance is always confident—and the jury is seldom a proper tribunal for distinguishing the true from the false, and fixing on each its rightful value. An enlightened and conscientious jury, when required to decide in a case of doubtful insanity, which is to determine the weal or woe of a fellow-being, fully alive to the delicacy and responsibility of their situation, and of their own incompetence unaided by the counsels of others, will be satisfied with nothing less than the opinions of those, who have possessed unusual opportunities for studying the character and conduct of the insane, and have the qualities of mind necessary to enable them to profit by their observations. If they are obliged to decide on professional subjects, it would seem but just and the dictate of common sense, that they should have the benefit of the best professional advice. This, however, they do not always have ; and, consequently, the ends of justice are too often defeated by the high-sounding assumptions of ignorance and vanity.” § 28.

“ It may at first sight be thought impossible to remedy this defect, without what would seem to be an engraftment upon our judicial system, of practices not in perfect harmony with it ; but the difficulty, after all, may not be found utterly intractable, if names are not allowed to usurp in our minds the place of things. Instead of the unqualified and irresponsible witnesses, now too often brought forward to enlighten the minds of jurymen on med-

ical subjects, it would be far better, if we had a class of men, more or less like that of the *experts* of the French, peculiarly fitted for the duty by a course of studies expressly directed to this end. They might be appointed by the government, in numbers adapted to the wants and circumstances of the population, and should be always ready at the call of courts, to examine the health of criminals, draw up reports touching the same, and deliver opinions. When the courts see the minds of jurors perplexed and confounded by the contradictory opinions of medical witnesses, and with no means of satisfying themselves as to what is really true, it should be their duty to submit the accused to the examination of *experts*, who should report at a subsequent period. Something like this is often done in France, which is much before our own country, or even England, in every thing relative to the judicial relations of medical men. Thus, in the case of Henriette Cornier, in Paris, for murdering a neighbor's child, November 4, 1825, the court, at the request of the prisoner's counsel, made shortly before the trial, which was ordered to take place February 27, 1826, appointed a committee of three distinguished physicians, to report, after due examination, whether or not she was a fit subject for trial. Their reports not being satisfactory to the *avocat-général* (attorney-general), the trial, at his request, was postponed to another session, and the prisoner was again subjected to the examination of the committee, who reported three months afterwards. What a contrast, does this calm and deliberate inquiry present to the indecent haste, with which the legal proceedings were precipitated against Bellingham, who committed his offence, was indicted, tried, and hung, all within the space of eight days. In this case, there was a strong disinclination manifested by the court, to listen to the plea of insanity; as if it were a fiction set up by counsel, in the absence of any other ground of defence; and the earnest request of his counsel for a little delay, that he might obtain witnesses from the part of the country, where the accused had lived and was well-known, who would substantiate the fact of his insanity, was disregarded." § 29.

"Is it necessary, to go into a labored argument to prove, that

this method of determining the grave and delicate question of insanity must be infinitely more satisfactory, than that of summoning medical witnesses to the trial, most of whom have but very imperfect notions of the disease, and probably have not had the least communication with the accused,—and forcing out their evidence, amid the embarrassment produced by the queries of ingenious counsel, bent on puzzling and distracting their minds? If a physician, after listening to divers vague and rambling details, concerning a person's ill-health, and looking at him across the apartment, without being permitted to address to him a single word, or lay a finger on his person, should then be required to say on his oath, whether or not the individual in question were laboring under inflammation of the lungs, bowels, or kidneys, he would scarcely restrain a smile at the stupidity, which should expect a satisfactory answer. And yet, absurd and foolish as such a course would be considered, in the abstract, it is the only one recognised by our laws, when the disease, whose existence is to be established, happens to be insanity. Besides, where mental derangement is suspected, there are many physical symptoms and numerous other circumstances, that cannot be investigated in an hour or a day, but require a course of diligent observation, that may occupy weeks or months, before the suspicion can be confirmed or disproved. From these considerations, the general conclusion is, that, in criminal cases, where insanity is pleaded in defence, the ends of justice will be best promoted, by the appointment of a special commission, consisting of men who possess a well-earned reputation in the knowledge and management of mental derangement, who shall proceed to the examination of the accused, with the coolness and impartiality proper to scientific inquiries.”¹ § 29.

¹ The following passage from a letter of Dr. Julius, of Hamburgh, will be read with interest, in connexion with the above remarks. The case to which he refers is that of Heller, published in our journal for January, 1837, page 316, which he denominates a “case of legal murder, committed on a man with *manio-homicide*.”

“Such cases, and similar ones, will unfortunately occur in every country,

Another topic, connected with the medical jurisprudence of insanity, is the restraint of the insane. This subject has not received the attention which its importance demands. The following suggestions are extracted from the work before us.

"In confining the insane, we have in view one or more of the following objects ; first, their own restoration to health ; secondly, their comfort and well-being merely, with little expectation of their cure ; thirdly, the security of society. When the restoration of the patient is the object sought for, as it always is or should be, in recent cases, no unnecessary restrictions should be imposed on this measure. The simple fact of the recency of the case should be sufficient, when properly attested, to warrant his seclusion, if it be deemed necessary to his cure. It is in that large class of patients, whose disorder is of too long standing to admit any rational expectations of cure, that restraint is most in danger of being abused. Among the reasons generally offered for taking this measure, we hear, perhaps, that the patient is destroying the peace of his family by constant ill-temper, or overbearing, or furious deportment, or that he cannot receive in his own house the attentions which his situation requires. The idea of depriving a person of his liberty, merely because certain other persons who would be benefited by such a step, say that he is mad, is of so monstrous a nature, that one finds it difficult to believe that it has

not possessing, like Germany, a physician in every district, appointed and paid by government, for all the legal cases, doubts, examinations, dissections, chemical analyses, &c., that may occur. These places require a degree of science unattainable by every physician or doctor in medicine. They are given only after an extremely severe examination by the medical board of the province, or of the whole state, and then they are retained for life. Without such an institution, horrors of all kinds must occur ; for, experience, very long experience, is necessary, for distinguishing cases of mental alienation, real and feigned, for drawing sometimes the line of demarcation between suicide and murder, in cases of infanticide, of pregnancy, rape, physical impotence, for the examination of unhealthy or adulterated articles of food, of noxious fluids, air, or gaseous exhalations, &c."

ever been actually carried into practice. Perhaps, in this country, it never has ; if so, however, it is not because it has been prevented by the salutary restraints of the law, which, in many states, at least, is utterly silent respecting it. It may not have entered into the minds of grasping and ill-natured relatives, that removal and confinement present a readier means of obtaining the control of property on which their affections are placed, than the slow and uncertain effects of disease or old age, but it would be unwise to act as if this state of innocence is to continue always. In Great Britain, where the confinement of the insane has been the subject of much parliamentary inquiry, and various acts and amendments to acts have been passed, for the purpose of preventing the abuses that from time to time have been brought to light, this measure has in consequence become so hedged round with checks and precautions, that it would seem difficult, if not impossible, that it should become a means of injustice and cruelty. How far the object proposed has been obtained, may be sufficiently understood from the testimony of one whose ample experience rendered him well qualified to give it. 'It is a miserable thing to come away from a lunatic house, as I have many times done, with a conviction that there were individuals in it, whose liberation and a proper superintendence would turn wretchedness into comfort, without endangering the interests of any human being ; persons unfit, perhaps, to return to their families, or even to see them every day ; but yet alive to warm affections, never more to be indulged ; longing, as parents long, to see the faces of their children ; but, in consequence of an infirmity of temper, doubtless of a morbid kind, and requiring superintendence, subjected to live and die in a place which was to them a prison, without a friend with whom they could unreservedly converse.'"¹ § 362.

"It would be out of place here to detail the provisions of such a legislative act, as would place the restraint of the insane as far as possible beyond the reach of abuse, but its general features may be stated in a few words. The right of keeping the insane in

¹ Dr. Conolly : *Indications of Insanity*, 438.

confinement should be obtained by license from the government, which should impose such conditions as will best promote their welfare. It should appoint a board of commissioners, two or more of whom should be medical men of some practical knowledge of insanity, whose duty it should be to visit, from time to time, houses licensed for the reception of the insane, examine their accommodations, the moral and medical treatment made use of, and every other point in which the welfare of the inmates is deeply concerned, and submit their report to some branch of the government. They should have the power of discharging any patient whom they may consider unjustly confined, or capable of enjoying himself more at his own home. No patient should be admitted without a certificate of two or more physicians, one of whom should be an *expert*, countersigned by the selectmen of the town or mayor of the city in which the patient resides, that the individual is insane, and is unable to receive at home that care or attention which is necessary to his restoration, or to his temporary comfort and final welfare. The superintendents of these houses should be required to keep a register, in which should be noted the names of the patients, the date of their admission, the character of their insanity, by whom their certificates are signed, and such other particulars as may be deemed necessary by the commissioners." § 363.

"The third object above-mentioned, as sought by the confinement of the insane, is the security of society."—"Temporary confinement is all that the immediate security of society requires, and therefore the term of imprisonment, for which justices should have the power to commit, should be limited to a few weeks or months. If it be deemed necessary that this term should be protracted, it should be only by order of the judge of probate or one of the justices of the courts of law, whose duty it should be to examine the circumstances of the case, and if he decide in favor of farther imprisonment for another term which should be fixed by law, to ascertain by proper inquiries from time to time, whether any change in the mental condition of the patient will warrant his release before the end of such term." § 364.

The theory of insanity, adopted by Dr. Ray, is that which

attributes its manifestations to a diseased state of the brain; and which, as we have already mentioned, there is good authority for supposing, is now the acknowledged doctrine of scientific men throughout the world. But, unhappily, this doctrine has not as yet become the popular belief; and, consequently, does not at present exert its legitimate and proper influence in determining the legal relations of the insane, or in directing to the curative and alleviating means, likely to be employed with most success in their behalf.

The following extracts seem to us to present the scientific doctrine of insanity in brief and comprehensive language, and at the same time in a manner calculated to soften prejudice, and to carry conviction of its truth to the popular mind. They are taken from the twentieth annual report of the Friends' Asylum for the Insane, near Philadelphia.

"Insanity, in its various forms and degrees, has its origin in some disturbance of the brain, either structural or functional; which disturbance may spring from either a moral or physical source. Let it arise, however, from which it may, the proximate cause, producing the deranged manifestation of mind, is always located in the brain; and the disease should be viewed in the same light as any other malady to which the human system is obnoxious. This view of the subject, besides being in accordance with sound philosophy, and rendering the practical application of just principles of treatment comparatively certain, destroys the ground-work of that vulgar prejudice, which, shrouding insanity in the mysticism of metaphysics, cuts off the hope of medical relief, and too often excludes the unhappy sufferer from that consideration and tenderness, by which comfort is insured, and commits him to the care of those alike ignorant of his disease, and uninterested in his welfare or recovery.

"Disease having once fixed itself in an organ of such complicated and delicate structure as the brain, it is of the utmost consequence the patient should be so situated, that, while he is undergoing judicious medical treatment, the objects which solicit his

attention, and the moral circumstances which bear upon him, shall be calculated to divert his mind from that train of thought, which, if it has not been the means of goading him to madness, is yet so productive of irritation and excitement, as to destroy the efficacy of the remedial means employed, and almost preclude the hope of recovery."

"One of the most common attendants upon insanity is the suspension of affection for relatives and friends, which is often succeeded by dislike and detestation; and those places which have been the scenes of former comfort and enjoyment, by false notions and harrassing expressions, become associated in the mind with the causes of unhappiness and perplexity. Hence, home, and those who are watching over him with the tenderest solicitude for his welfare, instead of contributing to the sufferer's comfort, or promoting his recovery, most frequently aggravate the violence of his symptoms, and retard, if they do not repel, the approach of convalescence. This being the case, it is consonant alike with the dictates of disinterested affection and sound sense, that the patient should be immediately withdrawn from these sources of injury, and, as before remarked, be placed where both medical and moral means can be brought to combat with his disease; and hence one of the great advantages of properly conducted asylums. Unhappily, however, it too often happens that the friends of the patient, through mistaken kindness or false pride, suffer the most propitious period for effecting a cure to pass by, before they consent to his removal to a public institution, which he at last enters, when either his energies have become exhausted by unrestrained indulgence, or he has become too violent to be managed at home."

The general theory, that insanity is the result of cerebral disease, is modified by Dr. Ray, in conformity with the phrenological system, which considers the brain as a congeries of separate yet united organs, each of which has its special function. This theory of the brain furnishes altogether the most satisfactory explanation of the various phenomena of insanity; and the fact that it does so has been

considered by phrenologists as strong corroborating evidence of the truth of their system. Dr. Ray's classification of the various kinds of insanity corresponds with the phrenological divisions of the organs of the brain, namely, into those of the affective powers, including the propensities and the sentiments, and those of the intellectual powers.

Without entering upon any formal defence of this doctrine, we will only say, that if it be true, it furnishes an intelligible rule for ascertaining the civil rights, as well as the criminal responsibilities of the insane; it indicates the means to be employed, whether moral or physical, for their restoration to health, or for their restraint in a state of comparative comfort; and, finally, by considering insanity as a bodily disease, it holds out the strongest inducement to a prompt resort to remedial measures. If we do not greatly mistake, this theory has been adopted as the basis of the treatment of the insane, in some if not all of the most successful of our public institutions. We are not aware, that the phrenological mode of considering insanity is likely to be particularly objected to, except in reference to responsibility for acts, which, according to that theory, are themselves the first external manifestations of the disease, or in reference to acts, which are the result of deficient organization; and, before leaving the subject, we feel inclined to say a word concerning this objection. The whole objection resolves itself into one, which has been often made to phrenology, and as often answered, that it makes conduct depend on organization, and, thus, by subjecting our will to an invincible necessity, relieves us from all responsibility. But this objection is equally valid against every theory, which makes insanity a disease or the result of a disease of the brain, whether it considers the brain itself as a single organ, or a congeries of separate organs. The objector to the phrenological system, therefore, on this ground, is bound to urge his objection against the theory, which makes insanity a

disease of the brain ; and, until he succeeds in overthrowing that, we may well spare ourselves the trouble of a farther answer. It is worth bearing in mind, however, that the doctrine of homicidal insanity was not the original invention of phrenology, but was inferred by Pinel, Esquirol and others, entirely independent of any knowledge of an organ of destructiveness in the brain.

We shall bring this long article to a close, by thanking Dr. Ray for the gratification and instruction, which his work has afforded us ; and, by earnestly recommending it to all, who desire to become acquainted with the interesting subject of which it treats. Within the last half century, the phenomena of insanity have been observed and recorded, by men of undoubted integrity and profound scientific knowledge ; the nature and causes of this mysterious affection have been investigated with great ability and research ; and in the work before us, the legal relations of the insane are treated in a manner, which corresponds with the scientific advancement and present state of our knowledge on the subject of mental disease. When it is recollected, that all these legal relations come under the supervision and in some degree control of the members of the legal profession ; who, according to our present system, are chiefly instrumental in ascertaining the civil rights and disabilities and responsibilities of the insane, as well as in providing for their safe keeping, and the consequent security of society :—we shall not be thought unreasonable, in urging our professional brethren to qualify themselves for the responsible duties which thus rest upon them, by an intimate and thorough knowledge of the Medical Jurisprudence of Insanity.

Dr. Ray has most appropriately inscribed his work “ to the Hon. Horace Mann, to whose persevering exertions, our country is mainly indebted for one of its noblest institutions for ameliorating the condition of the insane.” L. S. C.

ART. VI.—PUBLICATION OF PRINTED PAPERS BY PARLIAMENT.

WE propose in the present article to give a short account of a recent important controversy between the English house of commons and the lord chief justice of the king's bench, growing out of the publication of certain printed papers by the former body; a controversy not less interesting to our own country than to that in which it took place, as we are at any time liable to similar collisions between legislative and judicial bodies. The origin of the controversy was as follows.

The inspectors of prisons, appointed by lord John Russell under the 5th and 6th William the Fourth, had presented a report to the crown, wherein among other things, a statement in the words following was made concerning the prison at Newgate: "We also found several books; amongst them, Guthrie's Grammar, a song book, the Keepsake Annual for 1836, and the ——— by ———, 18 plates, published by Stockdale, 1827. This last is a book of most disgusting nature and the plates are obscene and indecent in the extreme." The house of commons ordered this report to be printed for general sale and circulation, and thereupon Mr. Stockdale brought an action against Messrs. Hansard, the publishers and printers of the report in question, for a libellous (as he alleged) description of his work. In his declaration, the plaintiff described the work in question as "a certain physiological and anatomical book on the generative system, illustrated with anatomical plates." The plaintiff sued *in forma pauperis*, and the court assigned him counsel. The attorney general, Sir John Campbell, conducted the defence. The defendants pleaded, 1. the general issue; and, 2. that the words complained of in the declaration were

true. Issue was joined on both pleas in the common form. The case was tried before lord Denman in February, 1837. The attorney general, after giving an account of the report and a history of the proceedings which led to it, proceeded as follows :

“Gentlemen, there was a resolution of the house of commons on the 13th of August 1835, in these words: “Resolved, That the parliamentary papers and reports printed for the use of the house should be rendered accessible to the public by purchase, at the lowest price they can be furnished, and that a sufficient number of extra copies shall be printed for that purpose.” That was in the session of 1835. Then, in the session of 1836, these resolutions passed, Friday, March the 18th, 1836, “That the parliamentary papers and reports, and also the votes and appendix to the votes should be sold to the public at the price of one half-penny per sheet. That all charts, plans or drawings which these papers may contain be charged at the rate of 3d. for each half sheet, of 6d. for each whole sheet, of foolscap size, and 1s. per sheet of a larger size. That papers of former sessions, now remaining in store, be sold at the same rate as those of the current session. That Messrs. Hansard, the printers to the house, be appointed to conduct the sale. That, in order to render the parliamentary Papers accessible to the public through the means of other booksellers, it is expedient that a discount of 12½ per cent. should be allowed to the trade who shall become purchasers. That the committee recommend that Messrs. Hansard should charge in their accounts the actual expense incurred by them in carrying on the sale as proposed in these resolutions.

“Gentlemen, these resolutions being passed, Messrs. Hansards have acted in strict conformity to the orders of the house ; they have sold the reports, and have sold them without any profit ; they had no interest whatever in the sale of them ; they are the mere instruments of the house : in fact, they are the servants and agents of the house, and this is an action against the house of commons.

“Now, upon these facts I humbly submit to my lord, that, under

the plea of not guilty, we are entitled to a verdict, if we are entitled to it at all; that is the proper plea. This is repelling the charge of malice, and not guilty is the proper plea under which it is to be given in evidence. I submit, when we show that this publication took place in conformity to the express orders of the house of commons, we are privileged, and it cannot be considered a libel."

The facts above stated were proved by the testimony of the clerk of the house of commons. The attorney general also read some passages from the book in question, as evidence under the second plea. Lord Denman charged the jury to the following effect:

"It seems to me, gentlemen, that the only questions for you upon the general issue can be, first, whether the publication was by the defendants at all; and, secondly, whether it is the publication of a libel; because on the third ground, namely, that this is a privileged publication, I am bound to say, as it comes before me as a question of law for my direction, that I entirely disagree from the law laid down by the learned counsel for the defendant. I am not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whatever arrangements may be made between the house of commons and any publisher in their employ, I am of opinion, that the publisher who publishes that in his public shop, and especially for money, which may be injurious, and possibly ruinous to any one of the king's subjects, must answer in a court of justice to that subject if he challenge him for a libel, and I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a court of justice for questioning that point, it were left unsatisfactorily explained, the judge who sat there might become an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it to a tyranny that no man ought to submit to.

"Gentlemen, I think that the case which has been quoted on that subject is not applicable to the present; it does not go the whole length, and it seems to me that it is not in any respect capable

of being urged as an authority to prevent my going the length I have just now stated; therefore my direction to you, subject to a question hereafter, is, that the fact of the house of commons having directed Messrs. Hansards to publish all their parliamentary reports, is no justification for them or for any bookseller who publishes a parliamentary report containing a libel against any man."

The jury found for the plaintiff on the general issue, and against the privilege set up by the defendants, but for the defendants on the plea of justification, being satisfied that the book was of the character set forth, which of course defeated and put an end to the action. The charge of the chief justice, as was naturally to be expected, attracted the early attention of the house of commons, and shortly after the trial, on the motion of lord John Russell, a select committee was appointed, "to examine precedents with respect to the circulation and publication of reports and papers printed by order of this house, and to ascertain the law and practice of parliament prior to and since, the order for the sale of such papers." A committee of fifteen was accordingly appointed, containing a large proportion of the most eminent lawyers and statesmen in the house, as will be seen from the following list of their names: Lord Viscount Howick, Sir Robert Peel, Mr. Attorney General, Mr. C. W. Williams Wynn, Mr. Tancred, Sir William Follett, Mr. Charles Villiers, Sir Frederic Pollock, Mr. Roebuck, Lord Stanley, Sir George Strickland, Sir Robert Harry Inglis, Mr. Serjeant Wilde, Sir George Clerk, Mr. O'Connell. The report of this committee, with the documents accompanying it, are comprised in a folio pamphlet of 99 pages. In the commencement of their report the committee state that they directed their attention to the following subjects.

"First.—The date of the earliest orders for *Printing* given by this house, and its practice on this subject.

"Secondly.—The degree of publicity which has at different periods been given to papers printed by order of this and the other house of parliament.

“Thirdly.—The manner in which the recent order of this house, for the printing and circulation of its reports and papers, has been carried into effect.

“Fourthly.—Whether papers printed for the house have been held to afford grounds for legal proceedings prior to the case of *Stockdale v. Hansard*, and what would be the effect of the principles laid down in that case : and—

“Lastly.—Your committee have stated to the house what appears to them to be the law and practice of parliament, in regard to the matter of privilege, to the elucidation of which their inquiries have been directed.”

The results to which the committee arrived are embodied in the following resolutions :

“That the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially of this house, as the representative portion of it.

“That by the law and privilege of parliament, this house has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges ; and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision, before any court or tribunal elsewhere than in parliament, is a high breach of such privileges, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon.

“That for any court or tribunal to assume to decide upon matters of privilege, inconsistent with the determination of either house of parliament thereon, is contrary to the law of parliament, and is a breach and contempt of the privileges of parliament.”

These resolutions were forthwith adopted by the house. Of the subsequent facts we have no other information than that contained in an article in the last January number of the *Quarterly Review*, which is as follows :

“Mr. Stockdale commenced fresh proceedings against Messrs.

Hansards ; Messrs. Nicholls received notice of an action for a libel alleged to be contained in a petition printed and sold by order of the house : the printers presented petitions praying directions how to act ; and it was now for the house to say whether they would enforce their resolutions by committing all (including the judges) who should presume to dispute, discuss, or impugn the alleged privilege, or, by tamely permitting the actions to proceed, virtually succumb to the jurisdiction of the courts. After a good deal of kicking and spluttering, it was deemed best and wisest, if not most honorable or most valiant, to back out, and (most lame and impotent conclusion !) on the motion of the attorney general, it was resolved, that the printers should be permitted to plead, and the attorney general be instructed to defend them—a resolution which simply procrastinates the grand conflict till the actions now pending have been tried.”

A question so interesting has given birth to a variety of publications ; among them are, a speech of Sir Robert Peel's in vindication of the privilege ; a letter to lord Langdale on the recent proceedings of the house of commons on the subject of privilege, by Thomas Pemberton, M. P. ; and remarks on a report of a select committee of the house of commons on the publication of printed papers, by P. A. Pickering, Esq., M. P., none of which we have had an opportunity of reading. Besides the article above referred to, in the *Quarterly Review*, there is one, on the same subject in the *Law Magazine* for November, 1837. Each of these high-toned tory journals is, singularly enough, lending its able support to a whig chief justice and in opposition to the great Coryphæus of the tory party, Sir Robert Peel, facts which might have been fairly set down as hardly within the limits of possibility, had they never actually taken place. Besides the above, there has also appeared a pamphlet containing the judgments delivered by the lord chief justice Holt in the case of *Ashby v. White* and others, and in the case of *John Paty* and others, printed from original manuscripts with an introduction.

The article in the Law Magazine is a legal argument, displaying much ability and research, directed principally against the position, that the two houses of parliament collectively, or either of them respectively, have exclusive and final jurisdiction in matters of privilege. After a careful examination of the cases in point, the conclusion to which the writer arrives is stated as follows.

“The result is not equivocal. These cases satisfactorily establish, that the judges will take cognisance of the privileges of parliament, when questions concerning those privileges are brought incidentally or collaterally before them for judgment in the way of action, so that the court is obliged to determine the question to prevent a failure of justice. They further show, that when privileges claimed by the house of commons have been submitted to the examination of the courts, and have been found not to be sanctioned by law, they have, whatever votes may before have passed upon the subject, been disallowed.”

The writer also denies most emphatically what he calls “this pernicious doctrine of later times, that the privileges of parliament are indeterminate and undefined.” We quote a few of the closing paragraphs of this article.

“The chief reliance of the advocates of undefined privilege is placed upon the doctrine, that the knowledge and determination of the customary law of parliament belong to the members of the two houses respectively, and that they are the proper and exclusive judges of their own privileges. But what is the sense in which the two houses of parliament respectively are properly said to be judges of their own privileges? Is any thing more meant than the unquestioned right in either house of parliament of exclusively determining, in the kind of cases which come before them, (in which the question always arises directly,) upon any violation of their acknowledged privileges? That, it is contended, is its sole legitimate import. They are the exclusive judges, on a direct question, whether any of their undeniable privileges have been infringed in the particular instance; and what shall be the punish-

ment for the infraction? But any exemption claimed which is not their privilege, any usurpation which is not sanctioned by the law, though misjudged by them, and improperly decided in their own favor, will not be conclusive upon the courts of law, when subjected to the examination of the judges indirectly; but will, like any other case of a mistaken decision, which is pronounced *not to be law*, be declared *not to be a privilege of parliament*.

"In these instances, the judges only decide upon what is *not* a privilege of parliament. They may also affirm a usage which is correctly stated according to parliamentary law. But they do not then receive the resolution as conclusive. For the house by voting a claim, a privilege, do not make it such, unless it is found to be so upon examination of the authorities. Suppose the house of commons were to vote it the privilege of members to have post-horses provided gratis on their way to and from Westminster, and an action of trespass were brought against a member who had taken them without the innkeeper's consent—would or would not a court of law have the power of deciding against the vote?

"The questions arising upon cases of contempt are wholly inapplicable, and may be laid entirely out of consideration. When either house adjudges any thing to be a contempt, their adjudication is a conviction, and their commitment in consequence, an execution. Every court is admitted to be the sole judge of contempts against itself.

"It matters not in what form, or by what color, the same parties bring the identical question before the court, to try the contested right of commitment.¹ It still comes before the court *directly*. Not so, where in a question of contract or of tort, brought by a third party, some supposed immunity or exemption occurs, as an incident in the case. The judges must then go on to try the validity of such excuse, or they will be guilty of a violation of their oaths.

¹ Thus in *Burdett & Abbott*, instead of the defendant being brought before the court by *Habeas Corpus*, an action of trespass was instituted against the speaker; but the question being identical, brought by the same party and immediate, was equally considered as coming before the judges directly."

“On such a proceeding, the question of debt or no debt, libel or no libel, is the principal matter brought directly and immediately before the court for its adjudication. Any excuse or justification offered under a claim of privilege, brings the existence of such privilege, as a distinct and collateral question, before a court, bound to decide the principal matter directly, and the collateral matters incidentally, and, therefore, compelled to recognise or to disallow the privilege claimed. The decision of a question which has come before the judges indirectly, and through the medium of another matter for determination, becomes here indispensable to the adjudication of the principal question.

“But this doctrine, it is said, might bring privilege of parliament to be judged of by very inferior courts. And why should not such courts (subject always to the revision of superior courts,) entertain the question of the privileges of the house of commons equally with that of the prerogatives of the crown, and the objects and intention of the entire and supreme legislature?

“That these opinions are not the narrow and prejudiced views of mere lawyers,—that they are the doctrines of eminent historians, and have been sanctioned by constitutional writers of deserved eminence,—we shall next proceed to show by citing at large the recorded sentiments of Clarendon and of Hallam.

“‘They are,’ says lord Clarendon, ‘the only judges of their own privileges, that is, upon the breach of those privileges, which the law hath declared to be their own; and what punishment is to be inflicted upon such breach. But there can be no privilege of which the law doth not take notice, and which is not pleadable by and at law. The punishing a person who has infringed a notorious privilege of parliament, is proper to the jurisdiction against which the contempt is. A court of law may discharge a member of parliament arrested within time of privilege, but has no more power to commit the man that sued or arrested him, than to imprison a man for bringing an action when he has no good title; neither can it judge of the contempt. But that their being judges of their privileges should qualify them to make new privileges, or

that their judgment should create them such, was a doctrine never before now heard of, &c.'

" 'The law of parliament,' says Hallam, 'as determined by regular custom, is incorporated into our constitution ; but not so as to warrant an indefinite, uncontrollable assumption of power in any case, least of all in judicial proceedings, where the form and the essence of justice are inseparable from each other.'

" With these enlightened opinions, compare the *liberal* doctrine of the Report on the Publication of Printed Papers :—' The precise limits of parliamentary privilege cannot be defined, because the emergencies which may call for its exercise cannot be foreseen !'

" 'Your committee have expressed a decided opinion that it is absolutely essential to the effective discharge of the most important functions of the house of commons, that the privilege of parliament should exist without restriction, and that the authority to determine the extent of that privilege and the occasion for exercising it, should rest exclusively with parliament.'

" 'To be *inter arcana imperii* is a strange notion of a law, although it may be good in politics,' said lord Holt ; adding, '*misera est servitus, ubi jus vagum et incognitum !*' "

The article in the Quarterly Review, evidently from a legal pen, is principally occupied with a vigorous and able examination of some of the positions of sir Robert Peel's speech, " which," as the writer remarks, " in point of spirit, command of language, and felicity of illustration, fully sustains his reputation as the most effective parliamentary speaker now living. But considerable legal lore, and what Blackstone terms 'a legal comprehension,' were necessary to analyse and distinguish the cases, and select and apply the precedents ; it is no discredit to sir Robert Peel that such acquirements lay beyond the pale of his pursuits ; nor ought his warmest admirers consequently to be much astonished when they find that all his main positions are based on what—with all due deference be it spoken—every lawyer

of discrimination must pronounce to be fallacies." The Quarterly Review is so extensively circulated, and so generally read in our country, that we deem it unnecessary to do any thing more than refer to the article in question, which has probably already attracted the attention of most of our readers.

The judgments of lord chief justice Holt have been published from a folio volume of manuscripts purchased many years since, by a member of the legal profession in England. They are more expanded than any reports which had previously been in print, and no one can read them without an increased respect for that illustrious judge. Appended to the judgments, are some very manly and temperate observations upon the report of the committee of the house of commons. In these observations, the law as laid down by the chief justice is accurately and discriminately stated as follows: "The defendant cannot justify in a court of law the infliction of an injury, by shewing that it was done under the command of the house of commons, unless the act done was necessary in the exercise of some privilege belonging to the house of commons. Mr. Hansard, then, does not establish a legal defence for a libel on the plaintiff's character, when he proves that he printed, published, and sold the injurious paper under the resolution of the house, dated March 16th, 1836, because it does not appear that this indiscriminate issue for profit is or can be necessary for the enjoyment of any privilege inherent in parliament."

Applying these principles to the case in consideration, the fair inferences from the law as laid down by lord Denman would seem to be, that the privileges of the house of commons protect the publication of its own proceedings, including votes, resolutions and reports of its own committees, but that they cannot extend that protection over any and every paper by simply ordering it to be published, unless it be printed for the use of the members exclusively, and its circulation confined to them.

Such is a brief outline of the history of this important controversy. We forbear making any further comments upon the principles of law involved in it, or expressing any opinion upon its merits, our object having been merely to state facts. Nothing has been finally settled, and the matter will probably be left in undisturbed repose. The house of commons might well deliberate, before they proceeded to enforce the privileges claimed by their report, and order their serjeant at arms to commit the lord chief justice of England to Newgate, under a warrant from their speaker, that being the only way to vindicate their authority. Such an attempt to overawe the highest legal tribunal in the country, and to substitute their own declarations of what the law is, for those of the regularly organized judicial bodies, to whom that function has been entrusted by the constitution, would naturally raise a storm of popular indignation which they might find it difficult to weather.

Since writing the above, we have seen the May number of the Law Magazine, which contains the following paragraph, in relation to the above controversy: "The parliamentary privilege question is still unsettled, and as it is understood that two actions are pending, there seems every chance of a fair stand-up fight between the house of commons and the courts of law."

G. S. H.

JURISPRUDENCE.

I.—DIGEST OF ENGLISH CASES.

COMMON LAW.

Selections from 4 Adolphus and Ellis, Parts 4 and 5; 5 Adolphus and Ellis, Part 1; 1 Neville and Perry, Part 4; 3 Bingham's New Cases, Part 3; 3 Scott, Part 4; 4 Scott, Part 1; 2 Meeson and Welsby, Part 4; 5 Dowling's Practical Cases.

ACTION ON THE CASE.

1. (*For obstruction of an easement—Declaration.*) In an action on the case for obstructing the plaintiff in the enjoyment of an easement, the plaintiff must show in his declaration that the obstruction was in the place or thing wherein the plaintiff is entitled. Thus, where a declaration alleged a right to take water at a cistern, and complained that the defendant wrongfully locked up a door leading to it, and thereby prevented the plaintiff from using the cistern; issue having been taken on the right to take water, judgment was arrested after verdict for the plaintiff, because *non constat* that he had any right to go through the door-way in question, although the verdict found that he had a right to take the water. *Tebbutt v. Selby*, 1 N. & P. 710.
2. An action on the case lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbor's house is burnt. And on pleas of not guilty, and that there was no neg-

ligence, it was held to be properly left to the jury to say whether the defendant had been guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man would have observed. (1 Salk. 13.) *Vaughan v. Menlove*, 3 Bing. N. C. 468.

3. (*For seduction.*) The declaration stated, that one M. H., being the daughter and servant of the plaintiff, with the consent of the plaintiff became the apprentice of one A., the wife of the defendant, for the term of two years, for the purpose of learning the business of a milliner, in consideration of £29 paid by the plaintiff, and in consideration that the said A., with the consent of the defendant, should find and provide the said M., with meat, drink and lodging; nevertheless the defendant debauched her, whereby she became ill, and incapable of serving the said A., and learning the said business, &c. &c.: Held bad on demurrer. *Harris v. Butler*, 2 M. & W. 539.

ARBITRATION.

- (*Award, when sufficiently certain.*) To a declaration for goods sold and delivered, the defendant pleaded, as to £30, parcel &c., payment of £30 in satisfaction. The plaintiff replied, that the £30 was paid for another and a different cause of action, specially traversing the acceptance of it in satisfaction of that sum in the declaration mentioned. The cause was referred, and the arbitrator found on the above issue for the defendant as to £3, for the plaintiff as to the residue: Held, that the award was sufficiently certain, and that the finding in effect assessed the damages at £27. *King v. Earl of Dundonald*, 5 D. P. C. 590.

ARREST.

- (*Of foreigner.*) The court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand on which the plaintiff had received a dividend, under proceedings in the country where the debt was contracted, similar to our proceedings in bankruptcy; though it was sworn by a competent person that the law of the foreign country did not warrant an arrest of the

person under such circumstances. *Brettillot v. Sandos*, 4 Scott, 201.

BAIL.

(*Competency.*) It is no objection to bail, that he is the drawer of a bill of exchange, on which his principal is sued as acceptor. (2 Bos. & P. 526: 2 Chit. 79; 1 D. P. C. 183.) *Prime v. Beesley*, 3 Bing. N. C. 391; 3 Scott, 37; 5 D. P. C. 477.

BILLS AND NOTES.

(*Pleading—Proof of consideration—Effect of admission on the record.* Assumpsit by indorsee against maker of a promissory note. Plea, that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration; replication, that the note was indorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration; on which issue was joined: Held, that on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendant ought to have proved the illegality by evidence.

An admission of a fact on the record amounts merely to a waiver of requiring proof of that fact; but if the other party seeks to have any inference drawn by the jury from the fact so admitted, he must prove it like any other fact. *Edmunds v. Groves*, 2 M. & W. 642.

BROKER.

(*When bound as principal.*) The plaintiff bought a quantity of hemp by auction at the rooms of the defendants, brokers in Liverpool. The defendants delivered an invoice in their own names as sellers. On payment being made by the plaintiff, the defendants gave him an order on D. and C. for the goods, which on presentation was refused, and the plaintiff could not obtain delivery of the goods. In an action against the defendants for the non-delivery; Held, that the defendants were bound by the representation in the invoice, and could not offer evidence to show that they sold as agents for C. and D., and that the plaintiff knew C. and D. to be the principals at the time of the sale. *Jones v. Littledale*, 1 N. & P. 677.

EVIDENCE.

(*Proof of payment.*) A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant, was in his own handwriting, but said he could not recollect the fact of payment: Held, nevertheless, that there was evidence to go to the jury of the fact of payment. *Trentham v. Deverill*, 3 Bing. N. C. 397; 3 Scott, 128.

FRAUDS, STATUTE OF.

(*Promise to answer for debt of another.*) A suit in chancery was pending between A and B, which C conducted for A, as his attorney. An agreement was made between B and C, with the consent of A, purporting that in consideration of the suit being put an end to, B, the defendant in equity, promised to pay C, the attorney, the costs due to him from A, the plaintiff in the suit: Held, that this was an agreement to pay the debt of another, and therefore ought to have been in writing. (3 Burr. 1886: 4 Man. & R. 259.) *Tomlinson v. Gell*, 1 N. & P. 588.

LANDLORD AND TENANT.

(*Tenancy from year to year, how created.*) A granted an annuity to B out of certain lands, with the usual powers of distress and entry if the annuity should fall into arrear. A afterwards granted a lease for years to the defendant. The annuity having fallen into arrear, B distrained on the defendant, and informed him that he had a charge on the premises in lease to him; the defendant thereupon signed an agreement "to attorn and become tenant to B," and paid him rent. Held, that this created a new tenancy from year to year between B and the defendant, determinable on payment of the arrears of the annuity, upon which the defendant's lease for years would revive. (Litt. 551; Vin. Abr. Confirmation; 8 B. & C. 471; 1 Ad. & E. 766.) *Doe d. Chawner v. Boulter*, 1 N. & P. 650.

LIBEL.

(*Advertisement in newspaper—Justification.*) The declaration complained that defendant published an advertisement in a

newspaper, stating that a *capias* had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to the sheriff's officer as would enable him to take him: *inuendo*, that the plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a *capias* had been issued, indorsed for bail, and delivered to the sheriff; that plaintiff had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. Held, a justification. *Lay v. Lawson*, 4 Ad. & E. 795.

LIMITATIONS, STATUTE OF.

(*Part-payment.*) In *assumpsit* on a promissory note bearing interest, proof that defendant, being sent to by plaintiff for money, paid £1, and said, "This puts us straight for last year's interest, all but 18s.; some day next week I will bring that up:" Held, sufficient answer to a plea of the statute of limitations, no evidence being given of any other debt due from defendant to plaintiff. (1 C. M. & R. 252.) *Evans v. Davies*, 4 Ad. & E. 840.

PATENT.

1. A patent was taken out "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes;" and the patentee, in his specification, which was enrolled in July, 1833, described his invention in general terms to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to. He then described more particularly three distinct objects which he proposed. The third was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound round with filamentous material;" he afterwards described the mode of effecting this object to be,

“by introducing into the fabric threads or strands of Indian rubber which have been previously covered, by winding filaments tightly round them, through the agency of an ordinary covering machine, or otherwise; these threads of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required: that by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, he was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportions of the elastic and non-elastic material:” he added, “that the strands of Indian rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent; and being in that state introduced into the fabric, they acquired their elasticity by the application of heat after the fabric was made:” Held, that the invention was properly the subject-matter of a patent, and that it was sufficiently described. *Cornish v. Keene*, 3 Bing. N. C. 570.

2. (*Specification.*) Where the specification claimed as an invention “the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back,” and it appeared that A, previously to the letters-patent, had made and sold chairs, in which the same principle was applied, but which could not be called into action without the use of additional machinery: Held, that the patent could not be supported, as the specification claimed too much, and would have precluded A from making the chairs he had made formerly.

Semble, that a patent for an improvement of A's chair would have been valid. *Minter v. Mower*, 1 N. & P. 595.

3. (*When void for inutility.—Novelty.*) If a patent be taken out for several inventions, which are claimed as improvements, and the jury find that one of them is not an improvement, the patent is altogether void. (4 B. & Ald. 541; 1 Bing. N. C. 182; 10 B. & Cr. 22.)

Where it appeared that a few months before the date of a

patent for an improvement in paddle-wheels, two pairs of the wheels were made for the plaintiff (to whom the patent was assigned soon after its date) by an engineer and his workmen at his own manufactory, under the directions of the patentee, and under an injunction of secrecy, the engineer being paid for them by the plaintiff; that, when finished, they were taken to pieces, packed up, and shipped for a foreign port, where, according to the plaintiff's directions, they were put together, and used (after the date of the patent) in steam-boats belonging to a company, of which the plaintiff was the manager and a principal shareholder: Held, that this was not such a publication of the invention as to avoid the patent. *Morgan v. Seaward*, 2 M. & W. 544.

SHIP.

(*Property in, when transferred.*) In June, 1833, the following agreement was entered into with J. L., a ship-builder: "Particulars and description of a new ship, now about one-third built, in the yard of J. L. (then followed a description of the length, breadth, and depth of the ship, the number of tons she was to carry, the timbers, and every thing she was to be built of and supplied with) for the sum of £1750, and payment as follows opposite to each respective name." The agreement was assigned by J. L., and after his signature followed these words: "We, the undersigned, hereby engage to take shares in the before-named vessel, as set opposite to our respective names, and also the mode of payment." This was signed by several parties, and amongst them by the plaintiff "for one-fourth," in October, 1833. Below their signatures was written, "I hereby agree to accept the above price and mode of payment. J. L." The plaintiff proved payment for his share by bills. The T. C. Company had signed for one-fourth; and H., a member of the company, used to go to look at the vessel when building, and occasionally found fault with the work, which was improved in consequence; and J. L. told his foreman to act according to H.'s directions. In January, 1834, J. L., became bankrupt; at that time the frame of the vessel was

on the stocks in his building-yard in an unfinished state. After the bankruptcy, some of the men continued to work upon her, receiving their money from H. : Held, that the property in one-fourth of the vessel did not pass by the agreement to the plaintiff. (5 B. & Ald. 942; 1 Taunt. 318; 4 Ad. & E. 467.) *Laidler v. Burlinsson*, 2 M. & W. 602.

STOPPAGE IN TRANSITU.

1. Goods were consigned to A, deliverable in the river Thames; on the arrival of the vessel in the river the captain pressed A to have them landed immediately; A, in consequence, sent B, his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, and kept until he carted them away to his customers in his own carts; but A (being then insolvent) told B at the same time that he would not meddle with the goods; that he did not intend to take them; and that the vendor ought to have them. The goods were, pursuant to B's direction, landed at the wharf, and were there stopped by the vendor. In trover for the goods by the assignees in bankruptcy of A against the wharfinger: Held, that the declarations so made by A to B were admissible in evidence, though they were not communicated to the vendor or to the wharfinger; and that they showed that A had not taken possession of the goods as owner, and therefore that the transitus was not determined. (Lord Abinger, C. B. dissenting.) *James v. Griffin*, 2 M. & W. 622. (See the same case on a former discussion, 1 M. & W. 20; 16 L. M. 196.)
2. A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them, without tendering back the bill.

Goods were consigned to A, deliverable in the port of London at a certain price per ton. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A's place of business, and saw B, his clerk, A being from home, and pressed him to send a craft for the goods, or he should be under the

necessity of landing them. After some days B wrote to the captain, stating that A was from home, but he, B, thought he had better land the goods on A's account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with "freight and charges" set opposite to them, and not in the name of any party as consignee. While they were there A became insolvent, and they were stopped by the consignor; Held, that the transitus was not determined. *Edwards v. Brewer*, 2 M. & W. 875.

VENDOR AND PURCHASER.

(*Of goods.—Estoppel by sold note and transfer.*) The defendant sold to the plaintiff a parcel of wheat, being then in the warehouse of B. & W., agents for the defendant. By the defendant's direction B. & W. transferred the wheat in their books into the plaintiff's name, the wheat remaining in their possession. The defendant subsequently received notice from one J. M. that the purchase of the wheat was on the joint account of himself and the plaintiff, and requiring him not to deliver it to the plaintiff. J. M. afterwards became a bankrupt, and his property vested in assignees, who gave the defendant a similar notice. In consequence of these notices the defendant directed B. & W. not to deliver it; and B. & W., when applied to by the plaintiff, refused samples. To trover for the wheat, the defendant pleaded that L. M. and T. H., the assignees of J. M., were jointly interested with the plaintiff in the wheat, and that the supposed conversion took place by their leave and licence. Replication, that L. M. and T. H. were not jointly interested. Held, that the property in the wheat passed to the plaintiff by the transfer in the books of B. & W., and that it was not competent to the defendant to give evidence that other parties were jointly interested with the plaintiff. *Kiernan v. Sanders*, 1 N. & P. 525.

WARRANTY.

(*Of horse, measure of damages in action upon.*) A declaration for a breach of warranty of a horse, alleged, by way of special damage, that the plaintiff had resold the horse at an advanced

price ; that the horse had been returned to him, and that he had lost all the profit he would have derived from the resale : Held, that on this declaration the plaintiff could not recover the difference between the two prices, it not being averred that the increased value of the horse was owing to any outlay by him since it had been in his possession. *Clare v. Maynard*, 1 N. & P. 701.

WITNESS.

(*Competency.*) A witness, who originally signed the deed of the Liverpool Building Society, and obtained a share, by which he acquired an interest in the funds : Held, not to be rendered competent by exchanging his share for a salary from the society, and cancelling it by the authority of the society, or by releasing his claim on the society for salary. *Rigby v. Walthew*, 5 D. P. C. 527.

EQUITY.

Selections from 1 Keen, Part 2 ; 2 Mylne & Craig, Parts 1 and 2 ; 9 Bligh, N. S., Parts 2, 3 and 4 ; 2 Younge & Collier, Part 2 ; 2 Russell & Mylne, Part 3 ; 3 Clark & Finnely, Part 1 ; 7 Simons, Part 3.

AGREEMENT.

1. Where accounts are referred to an arbitrator, with a special agreement as to the mode in which they are to be taken, and afterwards, upon the failure of the arbitration, the same accounts are referred to the master, he will be directed to take them in the ordinary way, and not according to the special agreement. Therefore, where, under such circumstances, it was one of the terms of the agreement that no advantage should be taken of the statute of limitations : Held, master was not to be ruled by that stipulation. *Cheslyn v. Dalby*, 2 Y. & Col. 170.

2. By an agreement between lord H., a peer of parliament, and proprietors of shares in a projected railway, it was stipulated on the one hand, that lord H. should withdraw his opposition to a bill in parliament for establishing the railway according to a certain line, and on the other hand, that the proprietors, on the bill passing, should pay certain sums to lord H. by way of compensation for the injury his land would sustain, and use their best endeavors to procure a deviation from the original line in the next session of parliament.

After the bill for establishing the railway had passed, the proprietors filed a bill to have the agreement delivered up to be cancelled, as being contrary to public policy, and therefore void. A general demurrer, for want of equity to the bill, was overruled. *Semble*, that such an agreement is contrary to public policy, and illegal. *Simpson v. Howden*, 1 Keen, 583.

BOND.

1. E. and F. entered into a joint and several bond, of which the condition was, that if they or either of them, and their or either of their heirs, executors, or administrators, duly paid an annuity to B. for his life, in manner following, namely : one moiety thereof by E. during her life, and the other moiety thereof by F., his executors, or administrators, during the life of E., and after the death of E., the whole by F., his heirs, executors, or administrators, during the life of B., then the bond should be void : Held, that the liability under the bond was joint and several, and that, F. having failed, after the death of E. to pay the annuity, the estate of E. became liable. *Church v. King*, 2 M. & C. 220.
2. A bond for a sum of money was ordered to be delivered up to be cancelled ; the lord chancellor being of opinion upon the evidence, first, that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied ; and, secondly, if that were doubtful, that the obligee's subsequent conduct and mode of dealing with the bond, during the whole of his life, amounted in equity to a release of the debt. (*Gilbert v. Wetherelt*, 2

Sim. & Stu. 254 ; *Leche v. Lord Kilmorey*, Turn. & Russ. 207.) *Flower v. Marten*, M. & C. 459.

CONSIGNEE.

Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, and the consignee in this country gives notice of the arrangement to the annuitant, and makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignments in his hands. (*Williams v. Everett*, 14 East, 582). *Fitzgerald v. Stewart*, 2 R. & M. 457.

CONTEMPT.

A barrister, also a member of parliament, appeared before a master, as counsel in support of a petition presented by himself and others. He afterwards addressed a letter to the master, expressed in threatening terms, the tendency of which was to induce the master to alter the opinion he was supposed to have formed upon the case ; and he subsequently wrote a letter to the lord chancellor, in which he avowed the authorship of the letter to the master. The lord chancellor committed him to the Fleet during pleasure. (Anon. 1 P. W. 675 ; *Exp. Jones*, 13 Ves. 237.) *Mr. Lechmere Charlton's Case*, M. & C. 316.

CORPORATE PROPERTY.

Real property, held for the purpose of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. *Bligh v. Brent*, 2 Y. & Col. 268.

DEMURRER.

Where two inconsistent statements are made in a bill, a defendant is entitled upon demurrer to adopt that which is most against the plaintiff's interest. *Vernon v. Vernon*, 2 M. & C. 145.

DISCOVERY TENDING TO CRIMINATE.

A demurrer to a bill for discovery in aid of an action brought by the plaintiff to recover damages for an assault and false

imprisonment was allowed, the whole object of the bill being to obtain a discovery of matters, which, if established, would have subjected the defendant to penal consequences. *Glynn v. Houston*, 1 Keen, 329.

DIVORCE.

A sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties under a marriage solemnized in England. (See *Soley's case*, Russ. & Ry. C. C. 237). *McCarthy v. Decaix*, 2 R. & M. 614.

EVIDENCE TO EXPOUND WILL.

Where the intention to dispose was clearly expressed on the face of the will, and parol evidence was tendered for the purpose of showing that the testatrix had mistaken the amount of the property which she was capable of bequeathing, supposing certain property in which she had only a life interest to be her own, and that a legatee under the will, who also took an interest in such supposed absolute property under a settlement made by the testatrix, ought, in order to enlarge the residuary bequest, to be put to his election, such evidence was held to be inadmissible. *Clementson v. Grendy*, 1 Keen, 309.

FRAUD.

1. When a person agrees to give up his claim to property in favor of another, such agreement is void if he was ignorant of his rights and of the value of the property; especially if the party with whom he dealt possessed better information of the subject. (*Cocking v. Pratt*, 1 Ves. 400). *McCarthy v. Decaix*, 2 R. & M. 614.
2. Where one solicitor is employed in a mortgage transaction, he is to be considered as the solicitor both for mortgagee and mortgagor, and notice to such solicitor is notice to the mortgagee; and where the solicitor himself was the author of a fraud which affected the title, and the fraud was committed under circumstances apparent upon the face of a deed fraudulently obtained, which would have excited the suspicion of a professional man, and have led to inquiry; it was held, that the mortgagee was as fully affected with notice, as if the fraud had been committed by a third person, and the knowledge of it acquired by the

solicitor; that the circumstances under which the fraud was committed were sufficient to fix the mortgagee with constructive notice; and that if a party does not use the precaution to employ a solicitor, he is in the same situation as to constructive notice as he would have been had he employed one. *Kennedy v. Green*, 2 M. & K. 699.

LANDLORD AND TENANT.

The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and cannot set up the non-performance of those covenants against his lessee as a ground for refusing the performance of a covenant in the original lease. *Jenkins v. Portman*, 1 Keen, 435.

LIMITATION TOO REMOTE.

Devise of freehold and leasehold estate to A and B as tenants in common, and if either of them should die without leaving issue, then as to the share of each of them that should so die without issue as aforesaid, to the use of the survivor of them, the said A and B and the heirs of his body. And in case both of them should die without issue of his or their body or bodies, then to the use of C for life, with remainder to the trustees to preserve, &c. and divers remainders over: Held, that the limitation to the survivor was a good limitation by way of executory devise, that by the word "issue" in the succeeding clause the testator intended such issue as were to take under the prior limitation, and that consequently the limitation over to C was not too remote. *Radford v. Radford*, 1 Keen, 486.

MAINTENANCE.

The testator gave legacies out of a sum of stock to the grandchildren named in his will, on their attaining the age of twenty-one; and if any of them should die under twenty-one, their portions to be equally divided among such of them as should attain twenty-one, but if the whole of his said grandchildren should die under that age, then he gave the interest of the sum of stock to the father of the said grandchildren for life, and after his decease the principal as therein mentioned: Held,

that the grandchildren were entitled to the interest during their minority. *Roddy v. Dawes*, 1 Keen, 362.

PARTIES.

A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit. *Alexander v. Mullins*, 2 R. & M. 568.

PARTNERS AND PARTNERSHIP.

1. The creditor of a partnership, in which one of the partners dies, and the surviving partner afterwards becomes bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners. (*Sumner v. Powell*, 2 Mer. 30; *Wilkinson v. Henderson*, 1 M. & K. 582). *Devaynes v. Noble*, 2 R. & M. 495.
2. A. and B. carried on the business of pencil makers, under the firm of A. and L., A. died, and B. carried on the business under the firm of B. & Co., successors to A. and L. A.'s executor, having commenced the same business, under the firm of A. and L., an injunction was granted restraining him from using that style, until the right should have been tried at law. *Lewis v. Langdon*, Sim. 421.

PRINCIPAL AND SURETY.

1. A son being indebted to his father upon a bond for £1000 and interest, subsequently joined his father, as surety, in a bond for £500 and interest, given by the father to a third person, and a memorandum was then indorsed on the first bond, by which it was agreed between the father and son, that the son should not be called on to pay the within-mentioned principal sum of £1000 until the father should have paid all principal money and interest due on the bond for £500: Held, that the memorandum related only to the principal, secured by the bond for £1000, and therefore that the representative of the father might proceed in equity against the representatives of the son for immediate payment of the interest, and of the principal, when

the principal and interest on the bond for £500 should have been paid. *Reed v. Norris*, 2 M. & C. 361.

2. A surety compounding a debt, for which he is bound with his principal, and taking an assignment of the debt to a trustee for himself, can only claim against the principal the amount actually paid. (Ex parte Rushforth, 10 Ves. 420, *Butcher v. Churchill*, 14 Ves. 567). *Reed v. Norris*, 2 M. & C. 361.

TRUST.

1. A father assigned certain leasehold premises to a trustee, in trust for his son, until he should attain the age of twenty-one years, and in the mean time to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and upon his attaining the age of twenty-one years, upon trust to assign the said premises, together with the lease and accumulations of rents, unto the said son, his executors, &c., for the remainder of the term: Held, the son took a vested interest in the lease, and, on his death, that it passed to his personal representatives. *Stephens v. Frost*, 2 Y. & Col. 302.
2. Trustee, after devising certain real estates to different persons, gave and devised all his real estates, not before disposed of by his will, to A B, his heirs, executors, administrators, and assigns, according to the tenure of and nature thereof respectively, to and for his and their own use and benefit: Held, that the trust estate passed. *Bainbridge v. Ashburton*, 2 Y. & Col. 347.
3. An engagement by A to answer the draft of B for payment of a debt due from B to C, no draft having been drawn by B, and no communication of the transaction between A and B having been made to C, raises no equity in C to recover the amount of the debt from it. *Rottenbury v. Fenton*, 2 M. & K. 505.
4. Where persons intrusted with the administration of a fund have incurred legitimate and proper expenses in performing duties thrown upon them by their fiduciary situation, they have a right, both at law and equity, to reimburse themselves out of

the funds in their hands, without any special provision to that effect. *Attorney General v. Mayor of Norwich*, 2 M. & C. 406.

UNDER-LESSEE.

The equitable assignee of an under-lease is clothed with the obligation to perform the covenants in the under-lease, though he is himself the original lessor, and he cannot set up non-performance of those covenants against his lessee, as a ground for refusing the performance of a contract in the original lease.

Jenkins v. Portman, 1 Keen, 435.

VENDOR AND PURCHASER.

1. Where an estate is charged generally with the payment of debts and legacies, and the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase-money, unless it be proved that he knew of the payment of the debts; and the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment.

Johnson v. Kennett, 2 M. & K. 624.

2. A vendor, in lieu of the price of £3000, agreed to accept an annuity of £100 a year for the joint lives of her intended husband and herself, in case the purchaser should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events, but not in all events, pay a further sum of £3000. This is not a security, but a substitution for the price; and the lien of the vendor on the land is discharged. *Parrott v. Sweetland*, 2 M. & K. 655.

WILL.

1. Where a testator gives an annuity to A for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of the testator. *Irvin v. Ironmonger*, 2 R. & M. 531.
2. Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if upon the whole instrument it appears that he meant to use them in a different sense. *Read v. Backhouse*, 2 R. & M. 546.
3. Where a testator gives an annuity to A for life, and directs the first payment to be made within one month from his, the

testator's death, the annuity commences from the death of the testator; and though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year. *Irvin v. Ironmonger*, 2 R. & M. 531.

4. A testator gave a legacy of £500 to his wife, and after her decease to G. W.; and if G. W. should die in her lifetime, to such person or persons as he should by will appoint; and in default of appointment, after the death of his wife, to the executors and administrators of G. W. absolutely. G. W. died, having made a will, by which he appointed an executor, but made no appointment of the legacy: Held, the executor took no beneficial interest in the legacy. *Stocks v. Dodsley*, 1 Keen, 325.
5. A testator entered into a contract for the purchase of an estate, by which the vendor agreed to convey the same to the purchaser, his heirs, appointees, or assigns. Subsequently to the contract, he made a codicil to his will, by which, after reciting the contract, he devised the purchased estate to his executors and trustees upon the trusts therein mentioned. He afterwards took a conveyance from the vendor to the usual uses to bar dower: Held, that the conveyance revoked the devise. (*Rawlins v. Burgis*, 2 V. & B. 386). *Bullin v. Fletcher*, 1 Keen, 369.
6. A testator, by his will, gave a specific chattel to A. Afterwards, by a codicil he gave a number of articles and of a different kind, and of much less value, to B, and in enumerating those articles introduced an imperfectly written word, which might be supposed to designate the chattel previously given to A: Held, that the bequest to A was not thereby revoked. *Goblet v. Beachy*, 2 R. & M. 624.
7. J. E., by his will, gave his residuary estate to S. M. and A. M., share and share alike, for their own use and benefit, independent of any other person: Held, that they took independent of their husbands. *Margetts v. Barringer*, Sim. 482.
8. Where by plain words, in themselves liable to no doubt, an estate tail is given in a will, it cannot be cut down to a life

estate, unless there are other words which plainly show the testator to have used the former as words of purchase, contrary to their ordinary sense ; or unless, in the other provisions of the will, there should be a clearly expressed intention inconsistent with the giving of an estate tail, and which intention can only be fulfilled by sacrificing the particular provision, and regarding the expressions as words of purchase. Under a devise, therefore, to W. F. and his heirs male, according to their seniority, and their respectively attaining twenty-one, the elder son surviving of the said W. F., and the heirs male of his body, to be preferred to the second or younger son, and in case of failure of issue male of W. F. surviving him, or dying without lawful issue male attaining twenty-one, then over : an estate tail was held to have been devised to W. F. (*Poole v. Poole*, 3 Bos. & Pul. 627). *Fetherston v. Fetherston*, C. & F. 67.

II.—DIGEST OF BRITISH-AMERICAN CASES.

Selections from Stuart's Lower Canada Reports; Berton's New Brunswick Reports; and Newfoundland Reports. ¶

AGENT.

1. (*Commission of.*) In Newfoundland, a commission of 2½ per cent. is all that an agent is entitled to on the purchase and sale of property for his principal, in the absence of any express agreement. *Duggan and another v. Trimmingham & Co.*, N. 177.
2. (*Liability of.*) A general agent is not responsible for the insolvency of a purchaser ; it is sufficient that the purchaser was in good credit at the time of the sale. *Ib.*

ALIEN.

1. (*Power of to inherit and transmit property.*) An alien domiciled in Canada, but not naturalized, is incapable of taking real property by devise. *Pacquet v. Gaspard*, Stuart, 143.

2. (*Same.*) The succession of an alien will devolve to his grandchildren, natural born subjects, to the exclusion of his own children who are aliens. *Donegani v. Donegani*, Stuart, 460.
3. (*Same.*) If an alien dies without issue, his lands belong to the crown, but if he leaves children, some born in Canada, and others not, the former exclude the crown, and then all the children inherit as if they were natural born subjects. *Ib.*
4. (*Same.*) Where an alien has a son who is also an alien, the children of the latter inherit from the grandfather to the exclusion of their father. *Ib.*
5. (*How decided.*) Who is an alien? is a question to be decided by the law of England, but when alienage is established, the consequences which result from it are to be determined by the law of Canada. *Ib.*

APPRENTICE.

(*Services of.*) Where a master employs an apprentice, whom he has undertaken to teach the trade of a *cabinet-maker*, in the trade of a *house-carpenter*, and the indentures are thereupon cancelled by the court of Sessions, the father of the apprentice is entitled to recover a compensation for his services, during the time he is so employed. *Barter v. Johnston*, N. 39.

ARBITRATION.

(*Validity of award.*) Upon a reference to three arbiters, or, specifically to any two of them, an award by two is good, if the third has had due notice of the matters referred and of the several meetings; but if the reference be to three generally, all should be present at the meetings, especially when the award is made, and then the award of two is valid, even if the third refuses to assent to it. *Meiklejohn v. Young*, Stuart, 43.

ARBITRATORS.

(*Act of two out of three.*) If a cause be referred to three arbitrators, with a stipulation that any two may make an award, and two of them meet, without notice to the third, and make an award, such award is irregular. *Raymond and another v. Luke*, Berton, 131.

ASSEMBLY.

(*Person committed by, when discharged.*) A person committed by the assembly to the common gaol "during pleasure," is discharged by a prorogation. *Ex parte Monk*, Stuart, 120.

AWARD.

1. (*Irregularity in witness not being sworn.*) An award will not be disturbed, because the witnesses were examined without being sworn, although the rule of reference required them to be sworn, if the party objecting to the award were present, and consented to such examination. *Reilly v. Gillan*, Berton, 135.
2. (*Improper evidence.*) Where arbitrators admit in evidence verbal proof of an agreement, which the statute of frauds requires should be in writing, and found their award exclusively thereon, the award is void. *Gosse and others v. Kelly*, N. 192.

BANKRUPTCY.

(*English commission of, how operating in Canada.*) An English commission of bankruptcy operates, in Canada, as a voluntary assignment by the bankrupt. The assignees, therefore, may sue for debts due to the bankrupt, or for his property, and may take the share of the proceeds of the bankrupt's estate, which belongs to the English creditors, but such proceedings of the assignees cannot deprive the provincial creditors of any acquired rights or privileges as to the property of the bankrupt, or the proceeds thereof, to which they, by the law of Canada, may be entitled, nor can such rights or privileges be affected by the commission, or by the assignment. *Bruce v. Anderson*, Stuart, 127.

BILL OF EXCHANGE.

1. (*Presentation for acceptance,—Laches.*) It is the custom in Newfoundland, for parties to retain bills of exchange for an indefinite period, without presenting them for acceptance, without prejudice to the holder's right to have recourse to the indorsers and drawer, in the event of their non-acceptance by the drawee. *Brine and another v. Meehan*, N. 1, 6, 8.
2. (*Same.*) But this custom is subordinate to the statute of limitations; and a non-claim of six years is a good plea in bar to

an action on a bill of exchange. *Hayes v. Neave and another*, N. 290.

3. (*Payment by.*) The requisition of the statute of 15 George 3, that employers shall pay the one half of servants' wages in money, or good bills of exchange, is not complied with, where an independent planter gives a servant in the fishery an order upon a merchant for the payment of his wages, and the servant takes from the merchant a bill of exchange, which is afterwards protested, and the planter continues liable notwithstanding to the servant for his wages. *Lahy v. Tree*, N. 147.
4. (*Same.*) But if a servant in the fishery takes the supplying merchant's bill, in payment of an order drawn by his employer for wages, he thereby discharges the master from all liability to him. *Meany v. Pynn*, N. 56.
5. (*Same.*) In the absence of express agreements among merchants, it is one of the implied conditions of sale in Newfoundland, that payment is to be made in bills of exchange, to be approved or rejected at the discretion of the party to whom the payment is due. *Meagher and Sons v. Hunt and others*, N. 160.
6. (*Damages.*) The drawer of a bill of exchange is liable to the damages provided by the laws of the country in which it is drawn and to no other. *Astor v. Benn*, Stuart, 69.

BOTTOMRY.

1. (*Part owner.*) One part owner of a vessel cannot hypothecate her beyond the extent of his own interest, without authority from the other part owners. *Bristowe and another v. Trustees of Butler and another's Estate*, N. 20.
2. (*Application of the money.*) The obligee in a bottomry bond is not bound to prove that the money was applied to the purposes for which it was lent. *Ib.*
3. (*Recovery by obligee.*) The obligee in a bottomry bond, given by one part owner, can only recover to the amount of the proceeds of the sale of the obligor's proportion of the vessel. *Ib.*
4. (*Performance of the voyage.*) The obligee's security does not depend upon the performance of the specific voyage for the purposes of which the money was raised. *Ib.*

5. (*Registry Acts.*) A bottomry bond is not a transfer within the provisions of the registry acts. *Ib.*

BY-LAW.

- (*Of joint stock company.*) A stockholder in a joint stock company can bring an action of account against the corporation, and thereby contest the validity of a by-law made by a board of its directors. *Keys v. The Quebec Fire Assurance Company*, Stuart, 425.

CARRIERS.

1. (*Responsibility of, how discharged.*) Several packages of goods were shipped at London to a merchant at Quebec, where upon the arrival of the vessel, and after delivery of the packages, it was ascertained that some of the goods were missing from one of the packages. Notice not having been given until several months afterwards, it was thereupon held, that the master was not responsible for the deficiency. *Swainburne v. Massue*, Stuart, 569.
2. (*Responsibility of.*) If merchandize, in good order, is entrusted to a carrier, and arrives at its destination, in a damaged state, where he holds it subject to freight, he is liable for the value. And if he pretends that fraud or concealment has been practised, the *onus* of proof lies upon him. *Hart v. Jones*, Stuart, 589.

CODE MARINE.

- (*Abolished.*) The code of marine, if it ever was in force, was no part of the common law of Canada, but a part of the public law, and consequently superseded by the effect of the conquest; and if it was law in the admiralty jurisdiction alone, whether it was public or common, the introduction of the English admiralty law abolished it. *Baldwin v. Gibbon*, Stuart, 72.

COLLISION.

1. (*Jurisdiction.*) The court of vice admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the city of Quebec. *Howard v. The Camillus*, and *Ritchie v. Orkney*, Stuart, 158, 613.
2. (*Negligence of defendant.*) In a cause of collision by one

steam vessel against another, where the loss was charged to be owing to negligence of the defendants, the court being of opinion that the damage was occasioned by such negligence, pronounced for damages and costs.

Quere, whether under certain circumstances one moiety of the aggregate amount of the damage should not be borne by each party. *Maitland v. Molson*, Stuart, 441.

COMMON, TENANT IN.

1. (*Acts by one.*) Where goods in the possession of B, in which A has an individual interest, are, without any authority from A, delivered by B to C, who retains the possession of them, A cannot maintain assumpsit against B for goods sold and delivered, or for money had and received, to recover the value of A's interest in such goods, there being no proof of a sale from B to C: but if such a sale be made, though without A's authority, it seems that A may affirm the contract, and maintain assumpsit against B for his share of the proceeds; and, in such case, the produce of the sale is the criterion of value. *Doyle v. Taylor and another*, Berton, 221.
2. (*Sale by one.*) If a tenant in common, *with the consent of his co-tenant*, sell more than his own share of the common property, he shall be considered in respect thereof, to have acted as the agent of his companion, and money had and received may be maintained against him. *Shaw v. Grant*, Berton, 125

CONSIDERATION.

(*Premium for guaranty.*) The payment of a sum of money as a premium for the guarantee of a debt, which is afterwards paid by the debtor, is a good consideration for a promissory note, given by the debtor to the creditor, for the amount of such premium. *Green v. Williams & Co.*, N. 10.

CONTRACT.

(*Rescinding of.*) Where a joint contract is entered into by eight persons, on the one part, with one person on the other, the contract cannot be rescinded on the part of the eight, by any less number, without the consent of the others. *Palmer and others v. Long*, Berton, 138.

CORPORATION.

1. (*Bequest of property to.*) The bequest of a sum of money to trustees, for the benefit of a corporation not *in esse* but in apparent expectancy, is not to be considered a lapsed legacy.
2. (*Same.*) A similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a university or college, upon condition that the same be erected and established within ten years from the testator's decease, such condition is accomplished if a corporate and political existence be given to such university or college, by letters patent, emanating from the crown, although a building applied to the purpose of such university or college may not have been erected within that period of time. *Desrivieres v. Richardson*, Stuart, 218.
3. (*Same.*) A devise of real estate to a corporation upon condition that it should, within the period of ten years, erect and establish, or cause to be erected and established, upon the said estate, an university or college; held, that the words erect and establish, &c. extend only to the erection and establishment of the corporation or body politic, forming the university or college, and not to the erection of a building in which the university or college is to be established. *The Royal Institution v. Desrivieres*, Stuart, 224.

DELIVERY.

1. (*Of imported merchandize.*) Merchandize imported from abroad is delivered to the consignee when placed on the wharf, and is from thence at his risk, provided notice of the arrival of his goods has been given to him. *Rivers v. Duncan*, Stuart, 139.
2. (*To party not fulfilling his part of the contract.*) A mercantile house at Newry directs a house at Quebec, to contract for the building of a ship, for which they, the Newry house, would send out the rigging. The Quebec house enter into a contract with some shipbuilders accordingly. The Newry house then direct their correspondent at Liverpool to send out the rigging; he does so; and it having been actually delivered to the Que-

bec house ; held, that the property in it was vested in the Newry house, and that the Quebec house had a right to retain it against the Liverpool correspondent, on account of their lien on it for advances made to the builders, and payment of custom-house expenses, although previously to the delivery they had obtained an assignment of the ship to themselves from the builders, and had registered it in the name of one of the partners in their house. *Rogerson v. Reid*, Stuart, 412.

EQUITY.

(*Specific performance.*) Where a contract has been entered into for the transfer of property in a vessel, which is void from a non-compliance with the provisions of the registry acts, the Supreme Court of Newfoundland cannot, under its powers as a court of equity, enforce a compliance with the terms of such contract, or afford any relief to the parties concerned in it. *Trustees of Langley v. Trustees of Darrell and another*, N. 379.

EVIDENCE.

(*Omission of plaintiff.*) In a commercial matter, if it appears, in an action of assumpsit, at the trial, that the plaintiff has a partner who was a party to the contract, and is not a party to the suit, the action will be dismissed, although the defendant has not pleaded the facts. *Pozer v. Clapham*, Stuart, 122.

EXECUTION.

1. (*Stay of.*) None but fishermen are entitled, under the custom of Newfoundland, to a stay of execution until the fall of the year. *Colman v. Executors of Kennedy and others*, N. 8.
2. (*Same.*) In Newfoundland, the defendant may have stay of execution in consideration of his poverty. *Flahavan v. Gamble*, N. 41.

FACTOR.

(*Difference between and confidential clerk.*) The great distinction between a *factor* and a *confidential clerk* or other agent is, that the factor has certain duties imposed on him, and is subject to certain legal liabilities resulting from those duties, which the confidential clerk is altogether exempt from ; and the lien which the law gives to the factor, upon the goods of the principal in

his possession, is founded entirely upon the consideration of the duties and liabilities to which he is thus exposed. *Evans v. Bully*, N. 375.

FISHERY.

The whole of the *sea-coast* of Newfoundland is dedicated to the fishery, by the 10 and 11 William III., c. 25 ; and, therefore, the governor cannot grant any part thereof. *Rowe v. Street*, N. 240.

FRAUDS.

(*Statute of.*) The statute of frauds (29 Charles II, c. 3,) is in force in Newfoundland. *Fitzgerald v. Dawe*, N. 177.

FREIGHT.

1. (*Goods destroyed.*) The owner and master of a vessel may recover freight for the carriage of goods, which have been destroyed in consequence of having been shipped in an improper condition. *Shaw v. Lemessurier*, N. 63.
2. (*Payment by consignee.*) Where, under a bill of lading, by which it is stipulated, that freight shall be paid by the consignee, the master of a general ship delivers the article to the consignee, and receives part payment of the freight from him, he cannot recover the balance of the shipper. *Winsor v. Stabb*, N. 543.
3. (*Difference in weight.*) It seems that freight ought only to be paid on fish (even where it has been properly taken care of and faithfully delivered) according to its weight at the time of delivery and not according to its weight at the time of shipment. *Ib.*

GOODS.

(*Sold for cash, but not paid for.*) Goods sold for cash, but not paid for, may be followed and claimed in an action of revendication, provided that the action be commenced within eight days after the transaction, and the goods have remained until then in the state in which they were delivered. *Aylwin v. McNally*, Stuart, 541.

GOVERNOR, (LOWER CANADA.)

(*Action not maintainable against.*) An action cannot be maintained against a governor of this province while in the administration of the government. *Harvey v. Lord Aylmer*, Stuart, 542.

INSURANCE.

1. (*Against fire.*) In insurance against fire the insurers pay the whole of any loss which does not exceed the amount insured, although the goods insured be of greater value. *Peddie v. The Quebec Fire Assurance Company*, Stuart, 174.
2. (*Condition precedent.*) If a condition, referred to in a policy of insurance against fire, requires, in the event of loss, and before payment thereof, a certificate to be procured under the hand of a magistrate or sworn notary of the city or district, importing that they are acquainted with the character and circumstances of the persons insured, and do know or verily believe that they have really and by misfortune, without fraud, sustained by fire, loss and damage to the amount therein mentioned, such certificate is a condition precedent to a recovery of any loss, against the insurers, on the policy. And if a certificate be procured, in which a knowledge and belief as to the amount of loss is omitted, it will be insufficient. *Scott v. The Phoenix Fire Assurance Company*, Stuart, 354.
3. (*Survey of vessel.*) That rule in the constitution of the marine insurance companies of Newfoundland, which directs that "there shall be a previous survey of every vessel, upon which an insurance is desired, by two surveyors nominated by the company, and that their certificate shall form the groundwork of the policy," is intended for the additional security of the company; and, consequently, cannot deprive them of the right to prove, that a vessel to which such certificate had been granted by the surveyors, was, notwithstanding unseaworthy. *Danson v. Cawley*, N. 433.
4. (*Liability for premium.*) The person ordering an insurance is liable for the premium; and the insurers can sustain an action against him. *Attwood and others v. Trustees of Kough & Co.*, N. 128.

INTEREST.

- (*Money deposited.*) When money is deposited for safe keeping, and is not returned when demanded, it is to be presumed, that the depositary has made use of it, for his own benefit, and the depositor is entitled to interest. *Cooney v. Winter*, N. 34.

JUDGE.

(*Fees of vice-admiralty judge.*) The court of K. B. has no jurisdiction in an action against a judge of the court of vice-admiralty to recover back money paid to him as fees in a suit determined in that court, but the remedy is by appeal to the high court of admiralty in England, or to the king in his privy council.

Semble, That the right of the judge of the vice-admiralty, to exact fees, is of an immemorial usage introduced into Canada after the conquest. *Wilson v. Kerr*, Stuart, 341.

JURY.

(*Party applying for.*) If a party moves for a jury he cannot afterwards reject the verdict on the ground that the jury ought not to have been allowed, because he, the mover, was not a merchant or trader. *Rivers v. Duncan*, Stuart, 140.

LEASE.

(*Destruction by fire.*) According to the local usage in Newfoundland, sanctioned by judicial authority, when the premises which form the principal subject matter of the lease are totally (but not when they are *partially*) destroyed by fire, the lessee is entitled to surrender his lease; in which case, he is released from all the covenants contained therein; but the surrender must be in writing, agreeably to the statute of Charles II., c. 3, § 3. *Cowell and another v. Macbraire*, N. 193; *Newman v. Meagher and others*, N. 207; *Duggan and another v. Barter*, N. 236; *Broom v. Preston and another*, N. 491.

LEGISLATIVE COUNCIL.

(*Right to commit.*) The legislative council has a right to commit, as for breach of privilege, in cases of libel,—and the court will not notice any defect in the warrant of commitment for such an offence, after conviction. *The case of Daniel Tracey*, Stuart, 478.

LICENSE.

1. (*To cut timber.*) A license to cut a certain quantity of timber from lands described in the license, and to remove the same, does not convey an interest in lands within the statute of frauds,

or give any property in standing trees. *Kerr v. Connell*, Ber-
ton, 151.

2. (*Same.*) Such a license gives the licensee no right to timber cut within the described limits, by a stranger without authority.

Ib.

3. (*Same.*) Timber so cut remains the property of the owner of the land; but against every other person, the possession of the timber and the labor bestowed upon it give the maker, though a wrong-doer, the right to it. *Ib.*

MARKET OVERT.

The town of St. Johns, in Newfoundland, is a market overt; but the out-harbors thereof are not so. *Baine and others v. Chambers*, N. 173.

MASONS.

- (*Lien of, upon buildings.*) The mason has an especial privilege, in the nature of a mortgage, upon any building erected by him, and for repairs.

This privilege, however, will not be allowed to the prejudice of other creditors of the proprietor, unless within a year and day there be something specific to shew the nature of the work done, or the amount of the debt due thereon. *Jourdain v. Miville*, Stuart, 263.

MEMBER OF PARLIAMENT.

- (*Privilege of.*) A member of the provincial parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices," and during his confinement elected a member of a new parliament, is not entitled to privilege from such arrest, by reason of his election to either parliament. *Ex parte Bedard*, Stuart, 1.

PARTNERS AND PARTNERSHIP.

1. (*Insolvency.*) Where two firms, consisting entirely of the same members, carry on distinct branches of trade, one in Newfoundland and the other in some other country, and both become insolvent, the property and effects of the Newfoundland firm will be distributed according to the laws of that island. *Ex parte Crawford and Co.*, N. 100.

2. (*Same.*) Where there are two branches of the same firm, the one in England and the other in Newfoundland, the property of the firm in each country, in the event of a bankruptcy or insolvency, is exclusively divisible among the creditors, who trusted the branch of the firm established in that country in which the property is situated. *Ex parte Ryan*, N. 113.
3. (*Admission.*) An admission of the cause of action, by some members of a commercial firm, will not bind the other partners. *Hunt v. Hunt and others*, N. 263.
4. (*Real estate of.*) If partners buy land, for the purpose of a partnership concern, it forms part of the partnership property; and if partnership property is invested in the purchase of a real estate, such estate will be partnership property, though conveyed to only one of the partners. *Ex parte Banks*, N. 396.
5. (*What constitutes.*) A partnership may be defined to be a participation of profits and losses. A participation of profits will however induce a participation of losses, so as to constitute a partnership with respect to third persons, although the parties themselves had no intention to share any losses that might arise; but a partnership, *inter se*, can only exist where there is an express agreement between the parties to divide both profit and losses in certain proportions between them; or where such agreement to divide losses may be implied from the fact of a joint ownership of the capital and stock in trade. *Trustees of Waller v. Broom*, N. 504.
6. (*Dissolution.*) The dissolution of a partnership without particular notice to persons with whom it has been in the habit of dealing, and general notice in the Gazette to all with whom it has not, does not exonerate the several members of the partnership from payment of the debts due to third persons not notified and who contracted with any of them, in the name of the firm, either before or after the dissolution. *Symes v. Sutherland*, Stuart, 49.
7. (*Manufacture of timber.*) Persons who jointly manufacture timber, which it is agreed shall be divided between them, are not partners, but tenants in common, or joint owners; and each has

only a right to dispose of his own share. *Wiggins v. White, and others*, Berton, 111; *Kerr v. Connell*, Berton, 151.

8. (*Liability of partnership property.*) Partnership property is not liable for the debts of any partners individually. *Montgomery v. Gerrard*, Stuart, 437.

POSSESSION.

1. (*Of land.*) An adverse possession of land in Newfoundland for sixty years is a bar to the rights of the crown; and the same kind of possession for seventy years will deprive the crown of its right of entry upon those lands. *The King v. Kough and another*, N. 195.
2. (*Of cove.*) Twenty years undisturbed possession of a cove will enable the party who has had such possession to sustain an action against a wrong-doer. *Ryan v. Thomas*, N. 203.

PRINCIPAL AND AGENT.

- (*Expenses of latter.*) A principal residing abroad is not liable to pay for the board and lodging of his agent in Newfoundland, unless he promises or undertakes to do so. *Smithers & Co. v. Williams & Co.*, N. 94.

PROHIBITION.

- (*Suit for salvage.*) A suit for salvage of a ship stranded on a sandbank in the river St. Lawrence, the *locus in quo* being *infra corpus comitatus*; held, that the case was not one of admiralty jurisdiction, and a prohibition granted to stay further proceedings therein. *Hamilton v. Fraser*, Stuart, 21.

PROMISSORY NOTE.

- (*By endorsee or endorser for less than face of note.*) In an action of assumpsit by the endorsee against the endorser upon a note endorsed for a sum less than that made payable by the note, the plaintiff cannot recover. *McLeod v. Meek*, Stuart, 456.

RIVERS.

1. (*In whom vested.*) Rivers, whether navigable or not, are vested in the crown for the public benefit, and no person, *seigneur* or other, can exercise any right over them without a grant from the crown. *Boissonnault v. Oliva*, Stuart, 564.

2. (*Same.*) A seignor, by his grant from the crown, acquires a right of property in the soil, over which a river not navigable flows, but in the running water he has only a right of servitude, whilst it is passing through or before the land, which does not authorize a diversion of the stream, or a use of the water to the prejudice of other proprietors above or below. *St. Louis v. St. Louis*, Stuart, 575.

SALE.

- (*Risk.*) A thing sold remains at the risk of the vendor, until every thing has been done in relation to it, which is required by the conditions of sale. *Henderson v. Brown and others*, N. 90.

SERVITUDE.

1. (*Navigable rivers.*) The banks of navigable rivers belong to the riparian proprietor subject to a servitude, in favor of the public, for all purposes of public utility. *Fournier v. Oliva*, Stuart, 427.
2. (*Same.*) Navigable rivers have always been regarded as public highways, and dependencies of the public domain; and floatable rivers are regarded in the same light. In both the public have a legal servitude for floating down logs or rafts, and the proprietors of the adjoining banks cannot use the beds of such rivers to the detriment of such servitude. *Oliva v. Boissonnault*, Stuart, 524.

SHERIFF.

- (*Liability of.*) The sheriff having seized by attachment a large quantity of timber and appointed a single guardian to take charge of the whole, in whose absence, during a sudden storm, a proportion of the timber, not being moored or otherwise secured, went adrift and was lost; held, that the sheriff was guilty of ordinary neglect and responsible for the loss. *McClure v. Shepherd*, Stuart, 75.

SHIP.

- (*Damage to goods by fire.*) If a fire takes place in a ship from a notorious defect in the mode of fitting her up, or from any other gross and culpable neglect on the part of the owners to adopt the ordinary and necessary means of preventing it, the excep-

tion of *fire* in the bill of lading will not protect them from a liability to answer for the damage occasioned by such fire to goods on board the vessel. *Hunters & Co. v. The owners of the Morning-Star*, N. 270.

SLANDER.

(*Original author.*) The disclosure of the name of the original author of a slanderous report, *previous to the commencement of an action* therefor, is a bar to the action. *Murphy v. Kough*, N. 93.

STATUTES, ENGLISH.

The statute of Uses, 27 H. VIII. c. 10, and the statute of Inrollments, 27 H. VIII. c. 16, extend to and are in force within the province of New Brunswick. *Doe &c. v. M'Fadden*, Berton, 172.

SURETY.

1. (*Liability of.*) A surety cannot be charged beyond his express agreement. *Fitzgerald v. Lilly*, N. 99.
2. (*Discharge of.*) A surety is discharged from his liability to pay the debt of another, by the party to whom the debt is due giving time to the principal debtor, without the knowledge and concurrence of the surety; but in an action against principal and surety, in such a case, the plaintiff may have judgment against the former. *Atwood and another v. Lilly*, N. 115.
3. (*Not discharged by mere neglect.*) Unless some act be done by the holder of a guarantee, *as an extension of the time limited for payment, with the knowledge of the surety*, the mere neglect by him to take active measures to enforce payment from the principal debtor, will not relieve the surety from his liability to pay the debt. *Brophy v. Atwood and another*, N. 161.

TRESPASS.

1. (*Against officer.*) An action of trespass, *d'injure*, cannot be maintained against an officer who executes a writ issued upon a judgment rendered by an inferior court in a matter over which they had jurisdiction. *Goudie v. Langlois*, Stuart, 142.
2. (*Against collector of customs.*) An action of trespass on the case, for a misfeasance, can be maintained against a collector

of the customs for exacting a larger sum for duties than the law authorizes, unless some reasonable ground of excuse for his conduct is shewn, or such facts be laid before the court as will exclude every imputation of malice or wilful intent. *Perceval v. Patersons*, Stuart, 270.

3. (*Damages.*) Where special damage is the gist of the action, and it be not alleged, or if alleged, be not proved, the action must be dismissed. But where the law gives a right of action for an injury, it presumes that damages are the consequence, and a conclusion for general damages will be sufficient. *Ib.*
4. (*Justification.*) A plea in trespass, justifying an entry upon land to retake timber of the defendant, carried there by a sudden rise of water, in a river in which it was being floated and carried to market, is bad, unless it shows that the defendant used his best endeavors to prevent the timber from being carried on to the plaintiff's land. *Read v. Smith and another*, Berton, 194.

USUAL CREDIT.

- (*Signification of.*) When goods are sold and delivered in Newfoundland, on the *usual credit*, the seller cannot maintain an action for the price, until the fall of the year, to wit, after the 20th of October. *Trustees of Dalton and another v. Simms*, N. 39.

VARIANCE.

- (*Teste of writ.*) An allegation under a *videlicet*, that a writ was sued out on a particular day, does not necessarily import that the day stated is the teste of the writ. *Spencer v. Stewart and another*, Berton, 128.

VESSEL.

- (*Liability of master and owners.*) The master and owners of a vessel are responsible for a deterioration in the quality of an article, shipped on board of such vessel, arising from the article in question having been placed too near to another article in its nature calculated to injure the former, as where bags of bread were stowed near some coals, and the bread was injured by a gas or vapor produced by the latter : and, it seems, that a

knowledge on the part of the shipper of the damaged articles, of the other parts of the vessel's cargo, and of the manner of stowage used on board of her, will not relieve the master and owners from this liability. *Beck v. Brig Kelton*, N. 468.

2. (*Ownership of.*) It is usual in Newfoundland, for two persons to agree, that the one shall build a vessel, and the other furnish him a capital to enable him to do so; and that the vessel when built shall be registered in the name of the party who furnished the materials. In these cases, the registered owner holds the vessel in trust, first, as a security for the payment of the money advanced by him; and afterwards for the benefit of the builder. *Delany v. Nuttall and others*, N. 243.

WAGES OF SEAMEN.

- (*Shipwreck.*) When a vessel is shipwrecked, and a part of the cargo saved afterwards by strangers, without any coöperation on the part of the mariners, who have been previously compelled to abandon the vessel, the latter are entitled to wages, in proportion to the net amount of freight earned. *Brig Atalanta*, N. 412.

WILL.

- (*Conflict of law.*) The Quebec act having provided, that every owner of lands, goods or credits, who has a right to alienate the said lands, goods or chattels in his or her lifetime, may devise or bequeath the same, at his or her death, by his or her last will and testament, such will being executed either according to the laws of Canada, or according to the forms prescribed by the laws of England. Held, that a will, invalid according to the French law, and not executed according to the provisions of the statute of frauds, so as to pass freehold lands in England, will not pass lands in Canada, although it would pass copyhold or leasehold property in England. *Metklejohs v. The King and Caldwell*, Stuart, 581.

WITNESS.

- (*Competency of by release.*) A general release to an interested person, "excepting a certain judgment in the releaser's favor," is sufficient to make such person a competent witness, if it does not appear that the judgment related to the matter in question. *Turner v. Elliott*, Berton, 133.

III.—DIGEST OF AMERICAN CASES.

Selections from 6 Watts's (Pennsylvania) Reports, and 16 Pickering's (Massachusetts) Reports.

ACTION.

1. (*Effect of plea of tender.*) The plea of a tender, and paying the money into court, is such an admission of the plaintiff's cause as stated in his declaration, as precludes an objection to the form of action. *Bailey v. Bucher*, 6 Watts, 74.
2. (*Conspiracy—Damages.*) An action on the case against two individuals for agreeing and conspiring with a third person to defraud his creditors may be maintained, when, in pursuance of such agreement, the defendants took assignments of his property, and aided him in getting out of the state, by which means the plaintiff was defrauded and prevented from recovering his debt. The fact that the debt of the plaintiff was not payable at the time of the alleged fraud, is no objection to the action. *Mott v. Danforth*, 6 Watts, 304.

In such action, the measure of damages is the value of the property withdrawn from the reach of the plaintiff, and not the amount of the debt due to him. *Ib.*

3. (*Want of consideration.*) B agreed to pay a debt due by A, for which C was surety. C paid the debt and sued B on his agreement. *Held*, that, being a stranger to the consideration, as between A and B, C could not recover on it. *Morrison v. Beckey*, 6 Watts, 349.

ARSON.

1. (*Construction of statute respecting.*) The statute 1830, c. 72, mitigating the punishment for burning a dwelling-house in the night-time in case it shall appear that at the time of the commission of the offence there was no person lawfully within the dwelling-house, applies to a case where the inmates are compelled by the offender to quit the house before it is set on fire; the object

of the statute being to protect human life. *Commonwealth v. Buzzell*, 16 Pick., 154.

2. (*Same.*) In the case of a dwelling-house entered and set on fire in the night-time by a mob, it was held, that a stranger, who went in at the same time for the purpose of protecting the persons and property of the inmates, was not a person lawfully within the dwelling-house, within the meaning of the statute, and consequently that his being in the dwelling-house when the fire was applied, did not render the arson capital. *Ib.*
3. (*Same.*) An out-building not communicating with the dwelling-house, (taking the word *dwelling-house* in a strict sense), is not a part of the dwelling-house, within the meaning of the statute, and consequently the fact of the inmates being in such out-building at the time when the dwelling-house is set on fire, does not render the offence capital. *Ib.*

ASSIGNMENT.

1. (*Proof of action.*) An assignment of property for the payment of a debt, accompanied by a parol agreement that the residue of the proceeds of the sale of the property, after the payment of the debt, should be returned to the assignor, is not of itself fraudulent; the proper limitation to this is, that the amount assigned bears a reasonable proportion to the debt provided for; a defect in which would be evidence of fraud in fact, which, however, is not a subject of a legal direction to the jury. *Rahn v. M'Elrath*, 6 Watts, 151.
2. (*Conflict of laws.*) Where a citizen of Rhode Island, by a bipartite deed of assignment, to which his creditors were not parties, conveyed all his property in trust to the assignee for their benefit, it was held, that such assignment was valid in Massachusetts as against a citizen of Rhode Island who had attached a portion of the property here, it being valid against attaching creditors by the laws of the latter state. *Whipple v. Thayer*, 16 Pick., 25.
3. (*Same.*) A bipartite deed of assignment, by which an insolvent debtor conveyed his property to assignees for the benefit

of his creditors, was executed in Rhode Island by the assignor and assignees only, they being all citizens of that state. It was held, that such assignment was valid as against a subsequent attachment of the property of the debtor in Massachusetts by a Rhode Island creditor, it being valid as against such attaching creditors in the latter state. *Daniels v. Willard*, 16 Pick., 36.

4. (*Same.*) An assignment of personal property by an insolvent debtor in New York, which is valid under the laws of that state as against dissenting creditors, is valid against a subsequent attachment by a citizen of New York, of property in Massachusetts belonging to the debtor, although such assignment would be invalid under the laws of Massachusetts as against dissenting creditors. *Burlock v. Taylor & Trs.*, 16 Pick., 335.

ATTACHMENT.

- (*Mortgage.*) Personal property under mortgage was attached by the plaintiff as the property of the mortgagor, but no notice of such mortgage was given by the mortgagee to the attaching officer at the time of such attachment, nor to the plaintiff during the whole course of the action against the mortgagor, although the mortgagee was the attorney of the mortgagor in such action, and knew of the attachment of this property. It was held, that the conduct of the mortgagor was not such as in a court of law would have the effect to give the plaintiff's attachment a priority over the mortgage. *Canada v. Southwick*, 16 Pick., 556.

BILL OF EXCHANGE AND PROMISSORY NOTE.

1. (*Variance.*) The declaration in an action brought in this country against the acceptor of a draft, averred that it was made at Boston; but it did not appear by the draft itself where it was made. It was held, that this was not a variance. *Fairfield v. Adams*, 16 Pick., 381.
2. (*Same.*) But if the plaintiff in such case claims damages, the place where the draft was drawn becomes material, and must be set forth truly in the declaration, and proved accordingly. *Ib.*
3. (*Nominal plaintiff.*) Where a bill of exchange is indorsed to "S. S. F., Cashier," he may maintain an action upon the bill in

his own name, notwithstanding he may be obliged to account for the proceeds to the bank of which he is cashier. *Ib.*

4. (*Demand of payment.*) The holder of the promissory note of a firm presented it for payment, at their last place of business in Boston, which was then occupied by strangers, and was there told that the firm had failed, and that the partners had gone out of town without leaving any funds; and no inquiry was made by the holder in relation to them, except at that place, although in fact one of the firm lived in Boston, and his name and place of residence were in the city directory. It was held, in an action against an indorser, that this was not a sufficient demand of payment. *Granite Bank v. Ayers*, 16 Pick., 392.
5. (*Notice.*) A notice of the non-payment of a note was brought by a notary, on the day when the note became due, to the shop of a stranger, who informed the notary that the indorser's place of business was behind such shop, and that he had gone out of town, and promised to give the notice to him so soon as he should see him. The notary thereupon left the notice on the counter of the shop, and on the next day or the day after, the indorser took the notice away. It seems, that this was not a sufficient notice to the indorser. *Ib.*
6. (*Forgery.*) A bank is entitled to recover against the second indorser of a note discounted by the bank, although the indorsement of the name of the payee is a forgery, and although the note was offered for discount by the maker and not by the second indorser. *State Bank v. Fearing*, 16 Pick., 533.

BY-LAW.

- (*Requiring snow to be cleared.*) A by-law of a city requiring the owners or occupants of houses bordering on streets, to clear the snow from the side-walks adjoining their respective houses and lands, is not strictly speaking a by-law levying a tax; and inasmuch as the burden created by it is imposed on a numerous class, and upon all persons equally who come within the description of such class, and as they commonly derive a peculiar benefit from the duty required, and are peculiarly able to perform it with the promptness which the good of the commu-

nity demands, the by-law is not partial and unequal within the sense of the provision in the constitution, that assessments, rates and taxes, imposed and levied on the inhabitants of the commonwealth shall be proportional and reasonable; but such by-law is reasonable and valid. *Goddard, Petitioner, &c.*, 16 Pick., 504.

CHARITABLE USES.

(*Stat. 43 Eliz. c. 4.*) A testator devised as follows; "I give and bequeath all the residue of my estate, both real and personal, of whatever name or nature soever, or wherever said property may be found, to the cause of Christ, for the benefit and promotion of true evangelical piety and religion. And I do order and direct my executor hereafter named and appointed, to collect all the above last specified property, as soon as can be done consistently, without sacrificing too much by forcing the sale thereof in an improper manner, not however to exceed the term of five years, and pay over the same unto T, S, P and R, placing full confidence in their piety, judgment and integrity, immediately to be by them sacredly appropriated to the cause of religion as above stated, to be distributed in such divisions and to such societies and religious charitable purposes, as they may think fit and proper." It was held, that power was given thereby to the executor to sell the real estate, in order to carry into effect the other purposes of the devise: and that by virtue of the statute 43 Eliz. c. 4, the devise was not void for uncertainty, either as to the persons who were to take the legal interest in the devise, or those who were ultimately to receive the benefit of it. *Going v. Emery*, 16 Pick., 107.

COMMON CARRIER.

(*Liability for loss.*) In an action against a common carrier by a consignee for not delivering goods in good order, the defendant will not be permitted to give evidence to contradict the bill of lading signed by him, unless it be to prove that a fraud or imposition was practised upon him. *Warden v. Greer*, 6 Watts, 424.

If the goods were injured in their delivery to the carrier, and he saw and knew it, this would not be such a latent defect as

would excuse him from liability for loss, beyond that which was occasioned by the peculiar nature of the article carried. *Ib.*

CONSTITUTIONAL LAW.

1. (*Construction of statutes.*) It seems, that a statute will in no case be deemed absolutely void. *Wellington et al., Petitioners, &c.*, 16 Pick., 87.
2. (*Same.*) Where an act of the legislature is alleged to be void, on the ground that it exceeds the limits of legislative power, and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected. *Ib.*
3. (*Same.*) If it appear that a legislative act may or may not be valid according to circumstances, the existence of those circumstances which will give it validity will be presumed, until the contrary is shown. Thus, if an act appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, it will be presumed, that such consent was given; and a stranger will have no right to contest its validity upon the ground that such consent was not given. *Ib.*

CONTRACT.

1. (*Made on Sunday.*) A note given on Sunday is void, and there can be no recovery upon it. If the contract, which was the consideration of the note, had been made on Saturday, in order to enable the plaintiff to recover, his action must be upon the contract, else he cannot make proof of and recover upon it. *Kepner v. Keefer*, 6 Watts, 231.

A note executed upon Sunday is not, *per se*, evidence that there was a contract made on Saturday; and, without other proof, it is error to submit the fact to the determination of the jury. *Ib.*

2. (*Executory.*) An action was brought upon the following writing, which was signed by both parties: "This certifies that *I have sold to*" the plaintiff "about five acres of land, more or less, being the same which I bought of him, in consideration of the same sum which I paid him for the same, with interest from the time I purchased the same till I paid for it (supposed about

six months), with the expense of the deed, also the taxes for one year." It was held that this was an executory contract for the sale of the land. *Atwood v. Cobb*, 16 Pick., 227.

3. (*Delivery.*) The plaintiff entered into a contract with the defendant for the purchase of a vessel then building by the defendant in Maine, by which it was agreed, that the vessel should "be completed and delivered, as soon as possible, at Frankfort Village, or Belfast, either of these places, at the option of the purchaser." It was held, that it was the duty of the defendant to give notice to the plaintiff when the vessel was finished, in order that the plaintiff might make his election as to the place of delivery, and that by disposing of her to a stranger without giving such notice, he made himself liable to the plaintiff for a breach of the contract. *Spooner v. Baxter*, 16 Pick., 409.

CONVEYANCE.

1. (*Deed by husband and wife.*) A deed of land executed by husband and wife, without any words of grant or warranty on the part of the wife, does not pass her estate in the land. *Melvin v. Proprietors of Locks and Canals, &c.*, 16 Pick., 137.
2. (*Dividing line.*) Where an instrument making partition of a parcel of land, described the dividing line as running from one landmark to another, without referring to any intermediate monument, or to any bevel or curve line, it was held, that the dividing line must be deemed to be a straight line; and that parol evidence to show that a curve line was intended, was inadmissible. *Allen v. Kingsbury*, 16 Pick., 235.
3. (*By guardian of non compos mentis.*) The guardian of a person *non compos mentis*, sold certain real estate belonging to his ward, under a license of court, and conveyed the same with a covenant that he was duly authorized to sell the granted premises. It was held, that the guardian was estopped by such covenant from setting up a claim in his own right, to any portion of such real estate, under a previous conveyance to him, in his own right. *Heard v. Hall*, 16 Pick., 457.

CORPORATION.

1. (*Foreign.*) A foreign corporation cannot be sued in Massachusetts. *Peckham v. North Parish in Haverhill*, 16 Pick., 274.
2. (*Same.*) In an action upon a joint contract made by the defendant and a corporation not within the state, and not liable to the processes of its courts, it seems, it is not necessary that such corporation should be named in the writ as a co-defendant. *Ib.*

COVENANT.

1. (*Implied contract.*) A lease of a stone quarry in consideration that the lessee shall pay to the lessor a certain price per perch for all stone taken out of it, is a contract on the part of the lessee that he will work the quarry ; and upon his failure so to do, the lessor may maintain covenant on the contract, and recover damages. And one verdict and judgment on such contract, pending the lease, is not a bar to another, when the term is further advanced. *Watson v. O'Hern*, 6 Watts, 362.
2. (*Conveyance of privilege of drawing water.*) A conveyance of a privilege of drawing water from a pond is not a conveyance of land ; consequently a covenant respecting the privilege cannot be said to run with the land, and cannot be enforced in an action by an assignee of the grantee. *Wheelock v. Thayer*, 16 Pick., 68.

DEED.

- (*May be shown a mortgage.*) A deed, in its form a conveyance, may be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. *Kunkle v. Wolfersberger*, 6 Watts, 126.

DEPOSITION.

1. (*Notice.*) During the session of the court, an order was obtained by the plaintiff, for taking the deposition of a witness, who was bound to sea, and notice was delivered to the defendant's attorney of record at 11 o'clock A. M. to attend the taking of the deposition at 4 o'clock P. M. of the same day ; and the attorney attended and filed interrogatories, but protested against the notice, as being insufficient. It was held, that the deposition

so taken was inadmissible in evidence. *Vinal v. Burrill*, 16 Pick., 401.

2. (*Opened by counsel*.) A deposition taken by virtue of a commission was sent enclosed in an envelope to the counsel of the parties for whose use it was taken, and was opened by him; but an affidavit was made by such counsel, alleging that he opened the envelope without knowing that it enclosed the deposition. It was held, that the deposition was admissible, at the discretion of the court, notwithstanding the rule of court, providing, in such case, that "all depositions shall be opened and filed with the clerk." *Burrill v. Andrews*, 16 Pick., 551.

DEVISE.

1. (*Estate in tail*.) H. devised all his real estate to his six sons, to be equally divided amongst them in quality and quantity, and charged it with the payment of legacies, and then added, "It is also my intent and meaning, that if any of my sons or daughters should die without a lawful issue, then is such a one's portion to be divided among their living brothers and sisters or their heirs." *Held*, to vest in the devisees an estate in tail, with a remainder in fee in the brothers and sisters. *Heffner v. Knepper*, 6 Watts, 18.
2. (*Land charged with payment of legacy*.) The acceptance of a devise of land charged with a payment of a legacy, creates a personal liability for its payment on the part of the devisee. *Loback's case*, 6 Watts, 167.
3. (*Construction of*.) J. M. devised to his widow, "the thirds of all my personal estate, goods, and chattels, and the thirds of all my real estate during her widowhood; to my son S., the half of all the remaining goods and chattels, lands and tenements, to have and to hold forever; to my younger son, J., the remaining half of my goods and chattels, lands and tenements, to have and to hold forever, share and share alike;" J. M. made no further disposition of the residue of the estate devised to his wife. *Held*, to be a devise of the residue to the two sons, who took the whole estate after the death of their mother. *M'Cay v. Hugus*, 6 Watts, 345.

4. (*Specific legacy.*) A testator gave to his wife two cows from his stock of cattle, to the eldest of his two sons "the remainder of his stock of cattle except one pair of yearling steers," and to the other son "one pair of yearling steers." At the time of making the will the testator had but one pair of yearling steers, and he had reason to expect a speedy termination of his life, and he did in fact die before the steers ceased to be yearlings. Held, that the bequest of the steers was a specific legacy. *Stickney v. Davis*, 16 Pick., 19.
5. (*Construction of.*) A testator devised as follows: "I order that S. J. shall have a decent support out of my estate, so long as she remains at my house where she now is. I give and bequeath unto my two sons, W. P. and C. A. P., all my lands and buildings, and also my right in a saw-mill, and my right in a pew in the meetinghouse in B., and also all my farming tools, to be divided equally between them, if they should live to become of age, otherwise it is my will it should go to one of them." It was held, that the two sons took a vested estate in fee, determinable, as to the one who might die first, upon the contingency of his dying under twenty-one years of age; that the heirs of the eldest son, who had died after he became of age, but during the minority of his brother, who had since arrived at full age, were entitled to one half of the real estate so devised; and that a division of the estate so devised, made by virtue of a warrant from the probate court, during the minority of the youngest son, the eldest being of full age, was valid. *Packard v. Packard*, 16 Pick., 191.

EASEMENT.

- (*Adverse enjoyment.*) An adverse enjoyment for twenty years will establish a right to an easement, though the party against whom it is claimed may have suffered no actual damage from such enjoyment; for he might have maintained an action for the invasion of his right without proof of actual damage, as the law presumes damage when a right is invaded. *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick., 241.

EQUITY.

1. (*Dower.*) A bill in equity to redeem brought by the plaintiff

as a widow entitled to dower, cannot be sustained unless it show that she has no remedy at law to recover her dower ; it should therefore set forth that the husband was seised, during the coverture, of only an equity of redemption, or that, if he was seised of the legal estate, the plaintiff joined with him in the mortgage, *Messiter v. Wright*, 16 Pick., 151.

2. (*Specific performance.*) The plaintiff entered into a contract with the defendants, by which it was agreed, that the defendants should remove a bank of gravel from the land of the plaintiff, and pay him therefor at the rate of one dollar a square, but that they should not pass across the plaintiff's land in effecting such removal. The defendants obtained a license to cross the adjoining land, over which it became necessary to pass in removing the gravel ; but after a portion thereof was removed the license was revoked. The plaintiff thereupon offered to permit the defendants to pass over his own land ; but it appeared that this would be attended with great expense to them. The court refused to compel a specific performance of the contract by the defendants, on the grounds, that the performance had become unlawful by the revocation of the license, and that the plaintiff had a plain, adequate and complete remedy at law. *Sears v. Boston*, 16 Pick., 357.

3. (*Pleading.*) To a bill in equity, in which it was alleged that the plaintiff was the owner of a water power, and that he had leased a part of it, and that the defendant had by a nuisance diminished the water power, the defendant demurred because the lessee was not made a party plaintiff ; but as it did not appear on the face of the bill, that the interest of the lessee would be affected by the diminution of the water power, there being a surplus beyond the quantity leased, the demurrer was not sustained. *Boston Water Power Co. v. Boston and Worcester Rail-Road Corp.*, 16 Pick., 512

ERROR.

(*Law and fact.*) If a plaintiff do not avail himself of a legal position, but joins issues, and puts his cause to a jury upon matters of fact, he cannot reverse a judgment upon the finding of

the jury, because that legal position might have been made available in his favor. *Maus v. Maus*, 6 Watts, 275

ESCHEAT.

1. (*As to real estate, of citizens and aliens.*) The Commonwealth does not become seised of the real estate of a citizen dying intestate and without heirs, until the rendition of judgment in its favor upon an inquest of office; for until then the presumption of law is that he had heirs. It cannot therefore convey such estate, before such a judgment has been rendered. *Wilbur v. Tobey*, 16 Pick., 177.
2. (*Same.*) But it is otherwise, if the deceased person be an alien and intestate, because he can have no heir. *Ib.*

EVIDENCE.

1. (*In action on the case.*) The declaration, in an action on the case, set forth, that the defendant hired a building of the plaintiff for the purpose of storing a reasonable quantity of grain therein, and that the defendant so carelessly and wrongfully overloaded the building, that it was crushed thereby. It seems, that evidence that the defendant had promised the plaintiff to be answerable for all damage that might be occasioned to the building by his storing grain therein, is inadmissible in such action; and it was held, that such evidence, if admissible for some purposes, would not of itself support the action, the cause of action set forth being a tort. *Putnam v. Kingsbury*, 16 Pick., 371.
2. (*Parol.*) In an action by a ship's husband for supplies furnished to the vessel, parol evidence is admissible to prove that all the defendants were jointly interested in the vessel, although she was registered in the name of one only. *Vinal v. Burrill*, 16 Pick., 401.
3. (*Copies.*) Where the accounts of a voyage were made up by the plaintiff, a part-owner of the vessel and ship's husband, from the vouchers, &c., and copies of the accounts were delivered to the defendants, the other part-owners, by whom they were acknowledged to be correct, it was held, in an action to recover the balance of the accounts, that copies of such copies were not

admissible in evidence, no notice having been given to the defendants to produce the original copies ; and that the original books from which the accounts were taken, were also inadmissible without such notice, to prove the contents of the copies which were delivered to the defendants. *Ib.*

4. (*Burden of proof.*) In an action against a bridge corporation to recover damages for an injury sustained by the plaintiff in consequence of the lamps of the bridge not being lighted, as required by law, it was held, that the burden of proof was on the defendants to show that there was no negligence on their part in this respect. *Worster v. Canal Bridge*, 16 Pick., 541.
5. (*In trespass vi et armis.*) In an action of trespass *vi et armis*, after proof of the trespass complained of, it is competent for the plaintiff to give evidence of the amount of inconvenience to which his family was put by the act of trespass. *M'Kinney v. Reader*, 6 Watts, 34.

In such action, under the plea of justification by the defendant, that he took the goods as a distress for rent, the plaintiff having called a witness to testify for him, it is competent for the defendant to show that the witness had connived with the plaintiff to cheat him out of his rent. *Ib.*

6. (*Interest.*) When the testimony of a witness upon his *voir dire* leaves it doubtful, whether he be interested or not, the party may resort to other sources of information. *Galbraith v. Galbraith*, 6 Watts, 112.
7. (*Meaning of devises.*) It is not competent to give evidence by the scrivener, as to what the testator meant by devises contained in his will. *M'Cay v. Hugus*, 6 Watts, 345.
8. (*Agency.*) The declarations and representations of an agent, made in effecting an agreement or doing an act within the scope of his authority, are evidence in an action against his principal. But declarations made under other circumstances are not evidence to charge the principal, or to establish the fact of agency. *Hanny v. Stewart*, 6 Watts, 487.
9. (*Competency of drawer of note.*) In an action by an indorsee against an indorser, the drawer of the note is a competent wit-

ness to prove, that the note, although purporting to be negotiable, was not so in fact as between the parties to the action; and that the indorsements upon the note did not exhibit truly the order in which they were made. *O'Brien v. Davis*, 6 Watts, 498.

EXECUTION.

(*Neglect of constable.*) A constable, who through neglect of duty becomes liable for and pays the amount of an execution directed to him, cannot recover the same, from the original defendant. *Arbengast v. Houk*, 6 Watts, 228.

EXECUTOR AND ADMINISTRATOR.

1. (*Indebted to testator.*) Testator appointed, as his executors, two persons who were indebted to him on bond, one as principal, the other as surety: Held, that this was a release of the bond as to both, and that the amount thereby became assets in the executor's hands. *Eichelberger v. Morris*, 6 Watts, 42.
2. (*Chargeable for neglect.*) An administrator is chargeable with the amount of a note due to his intestate for the collection of which he delayed the institution of legal proceedings for several years after his intestate's death, when with proper diligence the debt might have been collected. *Long's Estate*, 6 Watts, 46.

FRAUD.

1. (*Fraudulent contract binding on parties.*) Although a contract for the sale of goods may be fraudulent and void as to creditors, yet it will be binding as between the parties to it; and in any controversy on that subject between them, it is the duty of the court to instruct the jury to enforce the contract as made. *Telford v. Adams*, 6 Watts, 429.
2. (*Of creditors.*) He who parts with the possession of his property for the purpose of defrauding his creditors, cannot maintain trover to recover it back. But after his death, if his estate be otherways insufficient to pay his debts, the action of trover survives to his personal representatives, who may prosecute it for the benefit of creditors. *Stewart v. Kearney*, 6 Watts, 453.

FRAUDULENT CONVEYANCE.

(*Consideration.*) Where a woman conveyed her land to a man

in contemplation of a marriage between them, and without any other consideration, and the marriage took place but was void in consequence of his having a wife living, it was held, that there was a failure of the consideration, and that a reconveyance merely for the purpose of restitution, was founded on a sufficient consideration as against creditors. *Forbush v. Willard*, 16 Pick., 42.

HUSBAND AND WIFE.

1. (*Divorce.*) The debt of a husband during coverture, cannot be set off after divorce, against the distributive share of the wife in her father's estate, although the decree of divorce was subsequent to the death of the intestate. *Fink v. Hake*, 6 Watts, 131.
2. (*Replevin.*) Replevin cannot be maintained in the name of a husband and wife, to recover chattels, the property of the wife before marriage, unlawfully taken afterwards. The action must be in the name of the husband alone. *Seibert v. M^r Henry*, 6 Watts, 301.
3. (*Furniture supplied to wife by father.*) Where a father, at or about the time of the marriage of his daughter, and with the consent of the intended husband, places household furniture in the house provided by such husband for the residence of himself and wife when married, the presumption will be, that the furniture was a gift and not a loan to the daughter. *Nichols v. Edwards*, 16 Pick., 62.
4. (*Same.*) But where it appeared that the father told the daughter, before the marriage, that he could not give them much furniture, but would lend them enough to make them comfortable, and that two or three days after the marriage, the daughter signed a receipt acknowledging that the furniture was a loan, which understanding between the father and daughter, however, was not proved to be known to the husband, it was held, in an action by the father to recover possession of the furniture, which had been mortgaged by the husband, that it was for the jury to determine upon the evidence, whether the furniture was given or only lent to the daughter. *Ib.*

5. (*Joint seisin.*) By marriage the husband and wife become jointly seised of her real estate in fee in her right, and must so state their title in pleading. If a stranger enters and ousts them, it is a disseisin of both, and a right of entry immediately accrues to both or either of them. *Melvin v. Proprietors of Locks and Canals, &c.*, 16 Pick., 161.
6. (*Right of entry.*) Where a right of entry accrues to a feme covert, an entry by her will be lawful, provided her husband does not expressly disagree to it; for in the absence of proof to the contrary, his consent will be presumed, the entry being for his advantage. *Ib.*
7. (*Habeas corpus against a wife.*) A writ of *habeas corpus* may properly be issued against a wife, on the application of the husband, for the purpose of obtaining the custody of their child. *Commonwealth v. Briggs*, 16 Pick., 203.
8. (*Seisin.*) Where a husband and wife were seised of certain real estate, in right of the wife, and a creditor of the husband extended an execution thereon, as upon land held in fee simple by the husband, but without an actual entry, and the estate continued in the occupation of the husband and wife till her death, there being no children of the marriage, it was held, that such extent was not a disseisin of the wife; and therefore, that her heirs might maintain a writ of entry, declaring upon their own seisin, without an actual entry. *Larcom v. Cheever*, 16 Pick., 260.

INSURANCE.

1. (*Insurable interest.*) The plaintiff chartered a ship for a voyage from Robbinstown, Maine, to Trinidad de Cuba, and back to the United States, for which he was to pay the owner seven hundred and fifty dollars at Trinidad, and seven hundred and fifty dollars on her return. A cargo was put on board at Robbinstown by a stranger, the freight for which, amounting to one thousand and three dollars, was to be paid to the plaintiff at Trinidad. The plaintiff effected insurance of one thousand dollars on freight on board the ship at and from Robbinstown to Trinidad and at and from thence to the United States, and five

hundred dollars on freight at and from Trinidad to the United States, the freight being valued at one thousand five hundred dollars. The ship was lost on her outward passage, so that nothing became due from the plaintiff to the owner. It was held, that the plaintiff had an insurable interest; that it was protected by the terms of the policy; and that if the valuation was fairly made by the parties, with a full knowledge of the material facts, the plaintiff was entitled to recover one thousand dollars, pursuant to the valuation, but if the valuation was evasive and a cover for a wager, it should be set aside and the plaintiff should recover according to his actual interest. *Clark v. Ocean Ins. Co.*, 16 Pick., 289.

2. (*Unseaworthiness—Deviation.*) A vessel was insured "at and from Boston to St. Thomas and a market in the West Indies, and at and from thence to a port of discharge in the United States." The vessel arrived safely at St. Thomas, and having discharged about one third in weight of her cargo, received on board a quantity of mackerel for ballast, it appearing this was necessary for her safety, and that she was not delayed thereby. She then proceeded off Ponce in Porto Rico, and being compelled by the government of that island to enter, although there was no market at that port for her cargo, landed a quantity of mackerel to secure the payment of the port dues. Upon hearing that there had been a fire at Guayama, a port of the same island, eastward of Ponce, the vessel proceeded thither, and having sold a part of her cargo, and received on board a part of the return cargo, returned to Ponce, sold the residue of the outward cargo and completed the return cargo. On the homeward voyage to the United States, she was lost. It was held, that the receiving the mackerel on board at St. Thomas and landing it at Ponce, was protected by the policy; that even if the vessel was unseaworthy on the voyage from Ponce to Guayama, on account of her landing the mackerel at Ponce, this did not discharge the insurers from their liability, as the defect was cured before the loss; and that the return to Ponce for the purpose of disposing of the residue of the outward cargo, and

completing the return cargo, was not a deviation. *Deblois v. Ocean Ins. Co.*, 16 Pick., 303.

3. (*Insurable interest.*) In an action on a policy of insurance upon profits valued at the sum of one thousand dollars, it appeared, that the plaintiff had entered into a contract with one R., in which it was agreed, that the plaintiff, in consideration of the sum of one thousand dollars paid by him to R., should have a right to take one half of any palm leaf which should be imported by R., upon paying one half of the costs and charges on its arrival in Boston; that subsequently R., having received a bill of lading of palm leaf shipped upon his account, applied to the plaintiff to elect whether he would take one half thereof, or not; that the plaintiff elected to take it, and paid to R. the sum of six hundred dollars, as an advance upon it, which was repaid to him, after it was known that the palm leaf had been discharged at Charleston in a damaged condition; and that there would have been a profit, if the palm leaf had arrived in safety at Boston. It was held, that the plaintiff had an insurable interest in the profits; and that he was entitled to recover for a total loss, notwithstanding that a small salvage had been received by R. *French v. Hope Ins. Co.*, 16 Pick., 397.

4. (*Evidence.*) Where in the margin of a policy of insurance on a ship at sea, it was written that she had been spoken with on the 27th of August, parol evidence that a memorandum was left with the underwriters, with which it was intended the policy should conform, stating that she had been spoken with on the 20th, and that "27th" was inserted in the policy by mistake, was held inadmissible. *Ewer v. Washington Ins. Co.*, 16 Pick., 502.

JURISDICTION.

- (*Justice of the peace.*) A justice of the peace has not jurisdiction of an action founded upon a note given in consideration of a right to dig a mill-race and conduct water across the plaintiff's land. *Goddard v. M'Kean*, 6 Watts, 337.

JUROR.

1. (*How to be examined.*) In determining whether a juror should

be put upon the panel to try a cause depending upon the testimony of persons of a particular religious faith, he is not to be asked whether he entertains the opinion that a witness professing that faith is not to be believed on his oath. *Commonwealth v. Buzzell*, 16 Pick., 153.

2. (*Same.*) On the trial of an indictment for burglary and arson in destroying a Roman Catholic convent, which was burnt down by a great number of persons, it was held, that if a juror should think it was not a crime thus to destroy the convent, he would entertain a prejudice in the cause; and a juror was therefore asked, whether he had expressed or formed an opinion as to the general guilt or innocence of all concerned in the act. *Ib.*
3. (*Same.*) A juror returned to try an indictment, is not to be asked whether he thinks the crime set forth ought not to be punishable by law, or ought to receive a different punishment from that which the law prescribes. *Ib.*

LAW AND FACT.

(*Illegible papers.*) To decipher illegible letters or figures in a paper material to the issue, belongs to the jury, not to the court. *Armstrong v. Burrows*, 6 Watts, 266.

LIBEL.

(*Averment.*) A declaration alleges, that the defendant published of and concerning a certain court-martial and of and concerning the plaintiff as a member thereof, a defamatory libel and caricature, consisting of a lithographic picture and representation of the court-martial and of the plaintiff as a member thereof, in which caricature the court-martial and the plaintiff as a member thereof are pointed out by their position and certain grotesque resemblances, and are represented and exhibited in an awkward and ludicrous light, posture, and condition. After verdict it was held, that it was averred with sufficient certainty that the plaintiff was specifically and individually libelled. *Ellis v. Kimball*, 16 Pick., 132.

LIMITATION.

1. (*Acknowledgment.*) An acknowledgment of a subsisting debt,

such as will take a case out of the operation of the statute of limitation, must be unqualified and unaccompanied by any intimation that it would not be paid. *Gleim v. Rise*, 6 Watts, 44.

LIMITATIONS, STATUTE OF.

1. (*Debtor out of Commonwealth.*) The provision in the statute of limitations, that where the debtor at the time when the cause of action accrued, was out of the commonwealth and did not leave attachable property therein, the statute shall not begin to run until his return, applies to persons who have never been within the commonwealth, as well as to citizens who have been absent for a time. *Little v. Blunt*, 16 Pick., 359.
2. (*Same.*) This provision applies to a new promise made out of the commonwealth : and it makes no difference, whether the new promise was made before or after the original promise has been barred by the statute. *Ib.*
3. (*Same.*) In order to avoid this exception in the statute, the defendant is bound to show, that the creditor knew of his coming into the commonwealth or having attachable property there, so as to have had an opportunity to arrest him, or make an attachment, or that his coming or having property was so public as to amount to constructive notice or knowledge, and to raise the presumption that if the creditor has used ordinary diligence the defendant might have been arrested or his property attached. *Ib.*

MALICIOUS PROSECUTION.

1. (*How supported.*) A creditor in Maine, whose demand against a debtor in Massachusetts, amounted to the sum of one hundred and twenty-four dollars, attached under a writ claiming one thousand five hundred dollars, a vessel belonging to the debtor which was in Maine ready for sea, to the amount of two thousand dollars, the vessel being worth a much larger sum ; but the debtor had no other property in that state, subject to attachment. It was held, that these facts, unaccompanied by evidence to excuse the excessive attachment, would support an action for a malicious prosecution by the debtor against such creditor. *Savage v. Brewer*, 16 Pick., 453.

2. (*Against an attorney.*) An action cannot be maintained against an attorney at law for bringing a civil action, unless he commenced it without the authority of the party in whose name it was sued, or unless there was a conspiracy between them to bring a groundless suit, the attorney knowing it to be groundless, and commenced without any intention or expectation of maintaining it. *Bicknell v. Dorion*, 16 Pick., 478.

MORTGAGE.

1. (*Not discharged by marriage and new note.*) Where a mortgage was given to a feme sole to secure the payment of a note, and she afterwards married and the note was then delivered up to the mortgagor, and a new note taken by the husband of the mortgagee for the principal and interest then due, it was held, that the mortgage was not thereby discharged, as against the grantee of the mortgagor. *Pomroy v. Rice*, 16 Pick., 22.
2. (*Of personal property.*) Under the St. 1832. c. 157, § 1, [Revised Stat. c. 74, § 5,] which provides, "that no mortgage of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the said mortgage be recorded in the office of the clerk of the city or town, where the mortgagor shall reside," it was held, that a mortgage of personal property thus recorded, was valid against a creditor of the mortgagor, although there was no actual or constructive delivery of the property mortgaged, it being so described as to be identified. *Bullock v. Williams*, 16 Pick., 33.
3. (*Same.*) But if such property requires to be measured, weighed, counted off, or otherwise separated from other and larger parcels or quantities, these requisites are not to be considered as dispensed with, by registration. *Semble. Ib.*
4. (*Tender: unreasonable demand.*) The possessor of an equity of redemption sold on execution, having refused to accept the amount of the purchase money and interest, demanded the same on a subsequent day after sunset. Held, that the demand was at an unreasonable hour, and consequently a refusal to

comply with it did not avoid the effect of the tender. *Tucker v. Buffum*, 16 Pick., 46.

5. (*Delivery of personal property.*) Under the St. 1832, c. 157, [Revised Stat. c. 74, § 5,] which provides, that no mortgage of personal property "shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded in the office of the clerk of the city or town, where the mortgagor shall reside," the recording of the deed is equivalent to an actual delivery of the property. *Forbes v. Parker*, 16 Pick., 462.

NEGRO SUFFRAGE.

- (*Not allowed in Pennsylvania.*) A negro, or mulatto, is not entitled to exercise the right of suffrage, at the general election, under the existing constitution and laws of Pennsylvania. *Hobbs v. Fogg*, 6 Watts 553.

OFFICER.

1. (*Trespass against.*) Where the plaintiff suffered a pair of oxen belonging to him to be attached with cattle of a stranger, on a writ against the stranger, without giving the officer notice of his title, and after the lien by attachment had terminated and the oxen were separated from the other cattle, the officer seized them on an execution against the stranger, it was held, that the plaintiff might maintain trespass against the officer for such seizure, and this without any special notice that the oxen were his property, and without a previous demand. *Stickney v. Davis*, 16 Pick., 19.
2. (*Nominal damages.*) Although the execution creditor may have sustained no damage in consequence of a neglect on the part of the officer to return an unsatisfied execution, he is nevertheless entitled to recover nominal damages of the officer; for where there is a neglect of duty, the law presumes that damages have been sustained. *Laflin v. Willard*, 16 Pick., 64.
3. (*When justified in breaking open store.*) If a person having in his store the goods of a stranger, refuses to permit an officer to enter the store for the purpose of attaching the goods, on a

writ in favor of a creditor of the owner of the goods, the officer is justified in breaking it open for such purpose. *Platt v. Brown*, 16 Pick., 553.

PARISH.

1. (*May unite in settlement of minister.*) It is not illegal for two religious corporations to unite in the settlement of a minister, if they agree to worship together; and the circumstance that one of the corporations is in an adjoining state, makes no difference. *Peckham v. North Parish in Haverhill*, 16 Pick., 274.
2. (*Stipulation in contract with minister.*) In a contract by which a minister is settled over a congregational parish, it seems that a stipulation that the contract shall be binding on the parish, until the minister shall be dismissed by a mutual ecclesiastical council which shall be called for that purpose by a majority of the church belonging to the parish, is not illegal; but if it be illegal and void, still the parish cannot dissolve the contract at their own pleasure, without some misconduct on the part of the minister. *Ib.*

PARTNER.

1. (*Evidence.*) In an action against partners upon an alleged partnership account, it is competent for the plaintiff to prove, that one of the partners, after the dissolution of the partnership, acknowledged the account to be correct, and directed that a balance against a copartner on a separate account with the plaintiff, should be transferred to the debit of the partnership, stating that it was all one concern. *Vinal v. Burrill*, 16 Pick., 401.
2. (*Partnership merged in a corporation.*) Where the copartners in a firm obtained an act of incorporation as a manufacturing corporation, and transferred all their partnership property to the corporation, and the corporation made a by-law providing that the business should be carried on in the name of the partnership, it was held, that if the partnership was dissolved by these proceedings, yet that the members of it were liable as partners upon contracts subsequently made in the name of the partnership with third persons having no notice of the dissolution. *Goddard v. Pratt*, 16 Pick., 412.

POSSESSION.

(*Of plaintiff in trespass qu. cl.*) In an action of trespass *qu. cl.* it appeared, that the *locus* was an unappropriated lot of land in Provincetown, and incapable of cultivation, and that the plaintiff entered thereon, drove down stakes, some of which were marked with the initial letters of his name, around the exterior lines of the lot, and erected salt-works on a portion of the land. It was • held, that the plaintiff was entitled to judgment as against the defendant, who subsequently entered on a part of the land so inclosed with stakes, if the plaintiff entered with the intention to take possession, claiming the land, and if the defendant knew, or might, with ordinary care, have known these facts, and if such mode of inclosing land so situated had been acquiesced in by the inhabitants of Provincetown, as giving a valid possession. *Cook v. Rider*, 16 Pick., 186.

PRACTICE.

(*Note stolen.*) Where a negotiable promissory note, indorsed in blank, was stolen from the holder before it was due, it was held, that he might nevertheless recover the amount from the maker, in an action at common law, on filing a sufficient bond for his indemnification. *Fales v. Russell*, 16 Pick., 315.

SALE.

1. (*Transfer of property.*) The plaintiffs, machinists in Connecticut, contracted to furnish B with a paper-making machine, to be put up by them in B's mill in Worcester, and if it worked to B's satisfaction he was to pay for it, otherwise the plaintiffs were to take it away. It weighed about eight tons, and B was to cart it from Connecticut to Worcester. The plaintiffs accordingly set it up in a new mill adapted purposely to the dimensions and structure of the machine, and before the setting up of the machine was completed and while some of its essential parts were wanting, it was put in operation for experiment, but it did not work advantageously and to the satisfaction of B; and on the same day on which this trial was made it was attached as the property of B. Held, that the property had not been transferred to B. *Phelps v. Willard*, 16 Pick., 29.

2. (*Delivery.*) In pursuance of orders from W., of Boston, a quantity of merchandise was shipped at Liverpool by M., for the account of W., on board a general freighting vessel which had been consigned to M., and designated by W. for the purpose ; and a bill of lading was obtained by M., by the terms of which the merchandise was deliverable to W. It seems, that this was a sale and constructive delivery of the merchandise ; and it was held, that M. could not, by withholding the bill of lading from W. and subsequently inclosing it and the invoice in a letter to his agent, with directions to deliver it to W. only upon payment for the merchandise, convert such absolute delivery into a conditional one, or divest W. of his property in the merchandise. *Stanton v. Eager*, 16 Pick., 467.

SLANDER.

1. (*Actionable words.*) To utter words imputing a crime is actionable, although the crime could not be committed by the party charged with it, unless this fact be known or disclosed to the hearer ; as, to charge a tenant in common of a chattel with stealing it, there being no explanation that he was a tenant in common. *Carter v. Andrews*, 16 Pick., 1.
2. (*Same.*) At a public sale by auction of the books of the Lancaster Reading Room, the defendant spoke the following words : " We offer these books under a disadvantage, for the library has been plundered by C.," (the plaintiff). It was held, that these words were not actionable, there being no averment or colloquium in the declaration showing that they were used to denote a felonious taking ; and though the word plunder, in its ordinary meaning, imports a wrongful acquisition of property, yet it does not express the precise nature of the wrong done. *Ib.*

TRUST.

- (*Property conveyed for sole benefit of feme covert.*) A mother, in consideration of the love and good will which she bore to her daughter, who was then a married woman, conveyed certain real estate to H., in " trust and for the sole use and benefit " of the daughter during her life. It was held, that the legal estate vested in H., in trust for the separate use of the daughter : that

the supreme court therefore had jurisdiction of a suit in equity brought by the daughter against her husband and the trustee to enforce the execution of such trust ; that the husband, having received the rents and profits, was properly made a party to such suit ; that the wife, although she had separated from her husband, was entitled to such rents and profits from the time of the separation, unless it should be clearly proved by the husband, that she had misconducted herself and had separated from him without cause or any manner of excuse and without his consent ; and that no demand on the husband was necessary, it appearing by his answer, that he denied her right ; but that otherwise a demand would have been necessary. *Ayer v. Ayer*, 16 Pick., 327.

TRUSTEE PROCESS.

(*Bank check*.) Upon a settlement of accounts between the defendant and the town of W., a check upon a bank payable to bearer, was given by the town to the defendant, but it was agreed, that it should be placed in the hands of a selectman of the town, to whom the defendant was indebted, in order that he might procure the money from the bank and pay therewith his own demand and also a debt due from the defendant to the town, the amount of which was not ascertained at the time of such settlement. Whilst the check was in the hands of such selectman, the town was summoned as the trustee of the defendant. It was held, that the delivery of the check was a payment of the debt due from the town to the defendant, and therefore, that the town was not chargeable as his trustee. *Barnard v. Graves & Tr.*, 16 Pick., 41.

WAY.

1. (*Nuisance in turnpike road*.) A turnpike road is a public highway ; and an indictment will lie, as for a public nuisance, against any person placing obstructions thereon. *Commonwealth v. Wilkinson*, 16 Pick., 175.
2. (*Obligations of towns as to roads*.) Towns are not obliged to keep the whole of a highway from one boundary to the other, free from obstructions and fit for the use of travellers. *Howard v. North Bridgewater*, 16 Pick., 189.

3. (*Same.*) Thus, where the travelled part of a highway was raised with a gutter on each side, and beyond the gutter on one side and at the distance of nearly eight feet from the travelled path, were large loose stones which occasioned an injury to a traveller's horse, it was held, that the town was not answerable for the injury. *Ib.*

WILL.

1. (*Construction of.*) A testator having devised his plantation to his two sons, to be divided between them by a line beginning at a certain point, and running between two certain points, so as to include a given number of acres in one part, it was held, that the division line must be straight: and that it was erroneous to submit to the jury as a matter of fact, what the intention of the testator was; the interpretation of the will belonged to the court. *Brown v. Brown*, 6 Watts, 54.
2. (*Parol evidence.*) An arrangement in writing, by which one, in anticipation of death, disposes of his effects, and at the same time delivers the possession of them, shall be considered as revoked by the redelivery of the effects: and parol proof may be given that there were other considerations for the execution of the paper, which gave it the character of a contract. *Wigle v. Wigle*, 6 Watts, 522.

WITNESS.

1. (*Character.*) A witness is not incompetent to testify as to the character of another witness, because he has prejudices against him; and to reject the witness on this ground, is error. *Cook v. Miller*, 6 Watts, 507.
2. (*Deputy sheriff.*) The deputy sheriff, not being a party on record to the suit, is a competent witness for the plaintiffs, and may be compelled to give evidence as to the taking of the goods, whether he took them himself or not; and when and how they were taken, whether before or after the return day, mentioned in the *fieri facias*, had elapsed or not. *Sheerer v. Lautzerheizer*, 6 Watts, 543.
3. (*Religious belief of.*) The religious faith of a witness is not a subject for argument or proof, for the purpose of showing that

he is entitled to more or less credit than persons of a different religious sect. *Commonwealth v. Buzzell*, 16 Pick., 154.

4. (*Immaterial fact.*) Evidence is not admissible to contradict a witness in regard to an immaterial fact, whether such fact come out upon his examination in chief or upon cross-examination. *Ib.*
5. (*Interest.*) In an action of replevin of goods attached by the defendant as an officer, on a writ against a stranger, such stranger is an incompetent witness, by reason of interest, to prove that the property was in himself. *Pratt v. Stephenson*, 16 Pick., 325.
6. (*Competency.*) Where a loan was made by the cashier of a bank and memorandum checks received as security, it was held, that the cashier was a competent witness for the bank in an action by it against the drawer of such checks, although the transaction was alleged to have been not conformable to banking principles, and the cashier had given bond for the faithful performance of his duties. *Franklin Bank v. Freeman*, 16 Pick., 535.

LEGISLATION.

VERMONT. The legislature of this state, at the last October session thereof, passed thirty-two general, and forty-eight special acts, and eight joint resolutions.

Notes and Contracts. Whenever any bill, note, or other contract, not subject to grace, falls due by the terms thereof on the Sabbath, the same is to be taken and considered as due and payable on the Monday next following. No. 5.

Mortgages. The mortgagee of any real estate, on receiving satisfaction of his debt, is required, at the cost of the mortgagor, to acknowledge the payment by a certificate thereof on the mortgage deed, signed and sealed in the presence of one or more witnesses; and such certificate being recorded by the mortgagor, discharges the mortgage and record. No. 6.

Trial by Jury. The right of trial by jury, according to the constitution and laws of Vermont, is secured to persons claimed as fugitives from service, in all cases where proceedings are had under the act of congress of February 12th, 1793, relating to such fugitives. No. 7.

Decisions of the Supreme Court. An act relating to this subject provides for the annual election, by the senate and house of representatives, in joint assembly, of a reporter of the decisions of the supreme court, who is required to attend the court in person, and to prepare and publish the cases decided therein annually. The salary of this officer, besides the proceeds of the sale of his reports (other than of those furnished the state for distribution) is fixed at seven hundred dollars. The judges of the supreme court are required to furnish the reporter, on or before the first day of October in each year, with correct reports of the opinions given by them. No. 9.

Revision of the Statutes. The governor and lieutenant governor are authorized to appoint five persons, to revise, redraft, recompile, and arrange the statute laws, in methodical order, and to report the same to the next general assembly. No. 10. The names of the gentlemen composing this commission, are announced in our last January number, page 537.

Militia. An act "for regulating and governing the militia," contains a revision of the whole militia law, digested in fifteen chapters. No. 32.

FLORIDA. The legislative council of the territory of Florida, at the sixteenth session thereof, which commenced January 1, and ended February 11, 1838, passed sixty-one statutes (nearly all of which are private or special) and thirty resolutions.

State Government. The first section of "an act to call a convention for the purpose of organizing a state government," provides for the election, on the second Monday of October next, of a convention composed of members from each county, to devise and adopt the most efficient, speedy and proper measures for the formation and establishment of an independent state government for the people of Florida, and to form and adopt a bill of rights and constitution for the same, and all needful measures preparatory to the admission of Florida into the national confederacy. The other sections of this statute contain regulations for the choice of the members, and prescribing the powers and duties of the convention. No. 16.

Limited Partnerships. An act "to authorize limited partnerships," provides, that limited partnerships, for the transaction of any commercial, mercantile, mechanical, manufacturing or agricultural business, whatever, and the transportation of persons, produce or merchandise, within the territory of Florida, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities prescribed in the act; but not to be used for the purposes of banking or insurance. The rights, powers, and liabilities of these partnerships, and of the general and special partners, are essentially the same, as they are

in the other states, in which the *commandite* principle has been recently established. No. 17.

SOUTH CAROLINA. The general assembly of South Carolina, at the December session, 1837, passed thirty acts and sundry joint resolutions.

Negligent Management of Steamboats. The first section of chapter 12 provides, that if any person within the state shall suffer injury to life or limb, by the explosion of any boiler of a steamboat, or by reason of the unskilfulness, mismanagement, or negligence of those in charge or command of the boat or engine, or by reason of the deficiency or want of any matter or thing, necessary and proper for the management or seaworthiness of the boat, the captain, master, or person in charge or command, shall, for every such injury, be deemed guilty of a misdemeanor, and punishable by fine or imprisonment. The second section makes the owners of a boat responsible for the good conduct of the masters or captains, whom they employ, and also for the payment of the penalties inflicted by the first section.

Seamen. The provisions of an act, concerning the harboring of deserted seamen (18 Am. Jur., 209), are extended to every agreement to proceed or continue on a voyage, made within the state or elsewhere, and whether in contemplation of a voyage to be commenced within the state or elsewhere, provided such agreement is valid according to the laws of the state or country, where the same is made, or to which the vessel belongs; and the ship's articles, authenticated by the affidavit of the captain, are declared to be evidence *prima facie* of the fact, that any seaman, whose name appears thereto, has signed the agreement contained therein. Chap. 20.

Limited Partnerships. The formation of limited partnerships, for the transaction of any mercantile, mechanical or manufacturing business, or for the transportation of passengers, products of the soil, or merchandise, (but not for the purpose of banking or insurance), is authorized, by the first section of chapter 27. The remaining sections of this statute (except the last, which limits its

duration to the term of ten years from January 1, 1838), contain provisions in detail for the formation and regulation of these partnerships.

Abduction of Free Persons of Color. The forcible or fraudulent abduction of any free person of color, living within the state, with intent to deprive such person of his or her liberty, is made punishable by a fine of not less than one thousand dollars, and imprisonment for not less than twelve months. Chap. 28. § 1.

The actual sale of any such person, as a slave, subjects the offender to an additional punishment of "thirty-nine lashes on the bare back." § 2.

ALABAMA. The general assembly of this state, at the annual session thereof, begun and held at Tuscaloosa, on the first Monday of November last, passed ninety-two public and general laws, seventy-eight private acts, and several joint resolutions and memorials.

General Assembly. The time of convening the general assembly is changed from the first Monday of November to the first Monday of December. No. 4. •

Limited Partnerships are authorized to be formed for the transaction of any mercantile, mechanical or manufacturing business, but not for the purpose of banking or insurance, by a law similar in its provisions to those of other states. No. 12.

Factors, Carriers, &c., Embezzlement by. If any master or clerk of any steamboat, or other water craft, banker, commission merchant, factor, broker, attorney, or other agent, with whom any money, bank bills or merchandise, or any chattel or valuable security, is entrusted for safe custody or for any special purpose, and without any authority to sell, negotiate, transfer, or pledge the same, shall, in violation of good faith, embezzle, sell, negotiate, transfer, pledge, or in any manner convert the same to his own use, he shall be held guilty of a misdemeanor, and punishable *by the jury trying the offence*, by fine not exceeding one thousand dollars, and by imprisonment for not less than three nor more than twelve months. No. 20, § 1.

The embezzlement or conversion of any commodity or merchandise, entrusted with any banker, commission merchant, factor, broker, attorney or other agent, with authority to sell, is made punishable in the same manner. § 2.

Hawkers and Pedlers. Every hawker or pedler of *clocks*, or other goods, &c. (except goods manufactured within the state), is required to pay an annual tax of not less than fifty dollars, for each county, in which he shall sell his goods, under a penalty of two hundred dollars, for every article, sold or bartered, in any county, without first having paid the said tax. No. 32.

Evidence. Either party, in any action at law, wishing a discovery from the other, to be used in evidence on the trial, may file interrogatories and compel an answer thereto, in the same manner as in a bill of discovery in chancery. No. 36.

Spirituous Liquors. Every person, desirous to obtain a license to retail spirituuous liquors, is required to produce to the county court the recommendation of six reputable free-holders or householders of the county, who reside within five miles of him,—to enter into a bond with sureties—and pay the sum of twenty dollars.

The applicant is required also to make oath, that he will not sell any spirituuous liquors to any slave, or purchase any commodity from any slave, without the consent of the owner or overseer, or knowingly suffer the same to be done by his partner, agent, clerk, or servant, or any other person on his premises, if in his power to prevent it, and that he will not permit any kind of gaming on his premises.

Every citizen whether licensed or not, is authorized to sell ardent spirits to any other citizen of industrious or temperate habits, in quantities not less than one quart, provided the same is not to be drunk or consumed on the premises of the seller. No. 47.

MASSACHUSETTS. The legislature of this state, at the session which commenced on the third day of January, and terminated on the twenty-fifth day of April, 1838, passed one hundred and ninety-six statutes, (mostly of a private nature) and one hundred and two resolves.

Jurors. Members and officers of the senate and house of representatives are exempted, during the session of the general court, from serving as jurors. Chap. 21.

Insurance Companies are allowed to invest one third of their capital in the stocks of any rail-road companies within the state, whose franchise is not pledged or mortgaged, and whose capital is wholly paid in. Chap. 35.

Witnesses. Justices of the peace, masters in chancery, and auditors, are empowered to compel witnesses to attend and testify, in causes to be heard or tried before them, in the same manner as is provided in the Revised Statutes, chap. 94, §§ 5 and 6. Chap. 42.

Idiots and Insane Persons. Whenever application is made to any two justices of the peace, for the confinement of any idiot, lunatic, or insane person, not furiously mad, such justices are required, upon the application of the party complained against, to issue a warrant to the sheriff, or any of his deputies, to summon a jury of six lawful men, to hear and determine the question, whether the person complained against is an idiot, or lunatic, or insane, and not furiously mad. Chap. 73.

Composition of Debts by Executors. When any debtor of a deceased person is unable to pay all his debts, the executor or administrator is authorized, with the approbation of the judge of probate, to compound with such debtor and give him a discharge, upon receiving a fair and just dividend of his estate and effects, or such part of the debt, instead of the whole thereof, as the judge of probate may deem beneficial to those interested in the estate. Chap. 92.

Ownership of Shares in Corporations. Persons holding stock in any corporation, as executors, administrators, guardians or trustees, are exempted from personal liability, as stockholders. Chap. 98, § 1.

Such holders represent the shares or stock in their hands, at all corporate meetings, and are allowed to vote as stockholders. § 2.

In all transfers of stock, as collateral security, the debt, &c., intended to be secured, is required to be substantially described in

the conveyance ; and, certificates, issued to the pledgee or holder of stock, as collateral security, are required to state that fact, together with the name of the pledger, who alone is responsible as a stockholder. § 3.

Decisions of the Supreme Judicial Court. The reports of the decision of the supreme judicial court, on all questions of law argued and determined before the first day of September in each year, are required to be published on or before that day. Chap. 100.

Divorce. A divorce from the bond of matrimony may be decreed in favor of either party, whom the other shall have wilfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted. Chap. 126, § 1.

Camp Meetings. The disturbance of any camp or field meeting for religious purposes, by hawking or peddling any goods, wares, merchandise, or drinks, or practising or engaging in any gaming or horse racing, or exhibiting or offering to exhibit, any shows or plays, within one mile of the place of holding such meeting, is made punishable by fine not exceeding twenty dollars. Chap. 143.

Spirituous Liquors. The sale of any brandy, rum, or other spirituous liquors, or of any mixed liquor, part of which is spirituous, in a less quantity than fifteen gallons, (except by apothecaries and physicians duly licensed to retail spirituous liquors to be used in the arts, &c.) and that delivered and carried away all at one time, is prohibited under a penalty of not less than ten nor more than twenty dollars. This act takes effect on the first day of July, 1838, except as to licenses previously granted. Chap. 157.

Insolvent Debtors. See the article in our present number on the Insolvent Law of Massachusetts.

Days of Grace. When bills of exchange, drafts or promissory notes, become due and payable on Sunday, on the annual thanksgiving and fast days, or on the fourth day of July, they are to be deemed payable on the day next preceding, and may be noted and protested for non-payment on such day ; but the holders need not give notice of the dishonor thereof until the next day after. Chap. 182.

CRITICAL NOTICES.

1. *Remarks on Literary Property.* By PHILIP H. NICKLIN, A. M., &c. Suum cuique. Philadelphia: P. H. Nicklin and T. Johnson, 1838.

THIS little work, from the pen of the senior partner of the very respectable firm, by whom it is published, is intended, as the author remarks in his preface, "to draw the attention of authors, publishers, and readers to a subject that is important to them all;" namely, the law of copyright, in general, with special reference, however, to the project now on foot in this country, for the establishment of an international copyright law, by an act of congress.

In the first chapter of his book, Mr. Nicklin examines the petition, signed by fifty-six British authors, which was presented by Mr. Clay in February, 1837, to the senate of the United States, asking the privilege of securing copyrights for their works in this country; and, in the second, he examines the report, which the distinguished senator from Kentucky shortly afterwards made to the senate, on the subject of the petition. These documents are dissected and examined, with all the legal acumen of a lawyer, aided by the experience and judgment of the "old publisher;" and, the grounds and arguments which they contain, in favor of the proposed law, in our judgment, are successfully answered. If the international copyright scheme has nothing more to recommend it, than what we find in the above-mentioned petition and report, we

agree with Mr. Nicklin, that it ought not to be adopted at all, or, at least, not for many years to come. In the third chapter, the author advances several reasons, why legislative protection should not be extended to foreign authors, at present, one of which lets us into the knowledge of a curious fact, which will perhaps be new to some of our readers.

"Fourthly, if the reprinting of new British books here were subjected to a copyright tax, they would immediately be printed in Belgium, Holland, Switzerland, and perhaps in France and Italy, expressly for this market, in such cheap forms as to enable them to pay the duty and undersell the American copyright editions. There are large capitals in Belgium constantly employed in making what the French call *contrefaçons*, (called here reprints) of all the new books that appear in France, for which the Belgians pay no copyright, and which they print with such expedition, that they are often on their way to the four quarters of the earth, before a dozen copies of the originals have escaped from the confines of France. Belgium is in a similar position with regard to the literature of France, that we are in, with respect to that of Britain. French authors publish new works, and the Belgians reprint them not only for Belgium, but all the rest of the world except France; and thus cut off France from a foreign commerce in books. France (like Britain of us), complains of Belgium, and asks for an international law, but Belgium says, no; the benefit would not be mutual. Such a law between us and Britain would open our market to these industrious Belgians, whose *protography** would swell our surplus revenue to such a ruinous size, that even an Indian war would scarcely cure its plethora, and would operate as a check upon a very considerable portion of what is called by some statesmen, *American industry*." pp. 45—47.

The remaining six chapters are devoted to an explanation of Mr. Nicklin's own views, on what the law of copyright ought to be. He concludes thus :

"I incline to the belief that authors should have a *full property in perpetuity*; that is to say, that they, their heirs, and assigns, should pos-

* These Belgian pirates are very learned pundits, and dignify their business of making *contrefaçons* of new French works with the sounding title of *protography*, signifying that their hasty cheap editions are *printed* from the first copy that escapes from the lethargy of a French bookstore."

sess the entire control over their works forever; because, in the first place, I think that justice demands it, and in the next place, that it would conduce greatly to the moral and intellectual improvement of mankind, by holding out a sufficient inducement to men of talent and virtue, to devote their lives to the production of excellent works; and thirdly, because its inevitable consequence would be cheapness in the products of literary labor." p. 87.

The residue of the book consists of Mr. Lowe's valuable article on Copyright, reprinted from Napier's Supplement to the Encyclopædia Britannica, in which the history of literary property is brought down to the year 1819.

We have derived much information and pleasure, from the perusal of Mr. Nicklin's "Remarks." They supply many valuable facts and suggestions, which cannot fail to be of service, in aiding those who have no experience in "the trade," to form an opinion on the delicate and (to us at least) embarrassing questions, which he discusses.

In regard to the general subject of copyright, as we have neither space nor time at present to give reasons for our faith, we shall be very sparing of assertion. There are many intellectual products, of which it would be impossible for any one to be the author, who would not scorn the very thought of selling the pleasure or instruction which they afford; there are others, the knowledge of which is an actual pecuniary value to the possessor, which can be estimated without difficulty, and the cost of which to the author can be readily computed; and, between these two extremes, there are numberless other intellectual products, which partake of the character of both, without belonging wholly to either. It seems to us, that all these varieties of mental labor do not admit of nor demand, nor can they be justly regulated, by one uniform law.

But in reference to the right claimed for authors by Mr. Nicklin,—that of "full property in perpetuity,"—we have two remarks to make. The first is, that, unless some pious fraud be resorted to by congress, and sanctioned by the judiciary, the constitution of the United States seems to us to oppose an insuperable objection

to the existence of any such right. In this country, it is quite clear that no protection of literary property by the separate states would be in the slightest degree effectual ; and, therefore, it is not worth while to consider, whether the power conferred on congress excludes the exercise of a similar power by the states. Congress alone has power to protect literary property with effect ; but the power conferred on congress does not admit of a perpetuity ; and, if construed strictly, it would restrict the granting of the exclusive right to the author himself, and would exclude the extension of it beyond his life time. The eighth section of the first article of the constitution, which gives the power in question, declares that congress shall have power "to promote the progress of science and useful arts, by securing, for *limited* times, to *authors* and *inventors*, the exclusive right to their respective writings and discoveries."

The other remark, which occurs to us, and with which we shall conclude this notice, is founded in the inherent practical difficulty of the subject. Men have an instinctive respect for the quality of property, in those things, which, being visible and tangible as well as valuable, seem to be clothed with what may be called the natural attributes of property ; but this respect is in a great degree wanting, where there is no material thing for it to rest upon ; and a fatality seems to have attended every attempt, by means of positive legal enactments, to convert that into property, which possesses none of its natural and distinctive marks. The whole system of patentrights and copyrights, so far as it may be considered an attempt to create a new species of property, we regard as a signal failure ; the laws and judicial decisions, intended for the protection of this kind of property, have not effected the object, for which they were designed, and which they profess to have in view ; on the contrary, they have always been broken over or evaded, whenever there was any adequate inducement to set them at defiance ; and we are inclined to believe, that it would be found no less impracticable, to give an author a "full property in perpetuity" in his writings, than it has been to secure him an exclusive right thereto for a limited period.

c.

2. *Report of JAMES T. AUSTIN, Esq., Attorney-General of Massachusetts, for the year ending October 31, 1837*: submitted to the Legislature, at the January Session thereof, 1838.

No one can examine this valuable document, without being convinced of the fidelity and industry of the prosecuting officers of Massachusetts; and, in particular, of the devotion and assiduity of the attorney-general, to the numerous branches of public service, which fall within his official province. The suggestions for improvements and alterations of the laws, which it is the duty of this officer to make, being founded in actual experience, deserve great weight; and the abstracts prepared by him of the official business of the district attorneys, which present the statistics of crime in Massachusetts in a tabular form, contribute to render his annual reports interesting to philanthropists and legislators on both sides of the Atlantic.

In reference to these tables, Mr. Austin remarks:

"The progress of criminal jurisprudence in this country is a subject of great interest to our fellow men, where a severer code of criminal law is in force, and although the tables published here, which are all that the law permits, are not so full as might be desirable, they are among the best documents that can be framed for this general object." p. 27.

Valuable and useful, as are the tables of criminal statistics, which are now generally published, the light we get from them does little more than to show how ignorant we are of the real causes of crime, and how much we have yet to learn of the best means for its prevention. The implied suggestion of the attorney-general, in the above extract, merits the attention of all who feel an interest in the subject.

- 3.—*A Digest of the Laws of the State of Georgia*: compiled by OLIVER H. PRINCE. Second Edition. Athens: 1837.

This digest, the title of which is inserted at length in our list for January, is not merely a second edition of the compilation, executed by Mr. Prince, and published in 1822, under the same title, (See Am. Jur. vol. xviii, p. 232), but is a thorough revision and

recast of that work, upon the same plan, and including all the laws since enacted, previous to December, 1837.

The work was executed under the authority and by the appointment of the general assembly, and was examined by a committee appointed for the purpose, who, in their report of the same to governor Schley, speak of it in the following terms :

"As a digest of the laws of Georgia, then, we are of opinion, that this edition, both from its admirable arrangement, the accuracy of its execution, and the fidelity evinced by its details and references, which reflect the highest credit upon the editor, is entitled to the fullest confidence of the public; we have therefore to report to your Excellency our most cordial approbation of the same, and that in our opinion the volume from the quantity of necessary matter contained therein will be nearly twice as large as the old edition."

4.—*The Law Magazine; or Quarterly Review of Jurisprudence.*
No. 39. February, 1838. London: Sanders & Benning.

This number of the Law Magazine,—a periodical to which we are generally indebted for our digest of English cases,—contains eight articles, the titles of which are as follows: 1. Power of Visitors of Eleemosynary Corporations; 2. Life of Lord Alvanley; 3. As to a Vendor's Liability to produce Title beyond Sixty Years; 4. The New Criminal Statutes; 5. Law of Controverted Elections; 6. The Bench and the Bar. This is a review, we presume by the editor, Mr. Hayward, of the work bearing the same title, by the author of the "Great Metropolis," &c. The reviewer concludes his notice with the remark, that, with the exception of Blewitt's satire on the court of chancery, noticed in the first number of the Law Magazine, this work "is about the silliest, shallowest, worst-written and most objectionable," which he ever had occasion to review. 7. Colonial and Foreign Law. This is a review of a work recently published, entitled "Commentaries on Colonial and Foreign Laws generally, and in their conflict with each other, and with the law of England, by William Burge, Q. C." This work is very highly spoken of. 8. The Law of Wills. This article presents the principal alterations effected by the new act (1

Victoria, ch. 26,) under the following heads:—1. Who may make a will;—2. How a will is to be made and attested;—3. How revoked or altered;—4. What property will pass. The residue of this number is occupied with an unusually large digest of common law, equity, and bankruptcy cases,—lists of cases,—abstract of public general statutes,—tables of fees,—events of the quarter,—and a list of new publications.

5.—*Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes*, herausgegeben von MITTERMAIER und ZACHARIAE. Neunter Band, 1836 und 1837.

We noticed the first number of the ninth volume of this journal in the last July number of the Jurist. In the second and third numbers, among other interesting articles, we observe one on the criminal jurisprudence of France, England, and Italy, with a notice of the most recent works on that subject, and of the juridical journals, published in those countries, by Mittermaier; a view of foreign juridical literature, by Dr. L. A. Warnkönig, of Freiburg:—on the English law of 1836 concerning tithes, by Dr. M. Mittermaier, of Heidelberg:—remarks on the American and English penitentiary systems, compared with that of Geneva, by Mr. Grellett of Geneva:—a notice of the first volume of Story's Commentaries on Equity, by Professor Michælis, of Tübingen:—critical notices by Mittermaier of several late works:—and remarks on commercial courts in general, and their abolition in the Netherlands in particular, by Dr. Asser, (advocate) of Amsterdam.

Among the new publications, of which short notices are given in the second number, we notice Mr. Rantoul's report on the abolition of capital punishment, made to the legislature of Massachusetts, in 1836. The writer (Mittermaier) announces his intention to notice this report more at length in another place, in an article on the abolition of the punishment of death. The notice of the first volume of Mr. Justice Story's Commentaries on Equity Jurisprudence is merely introductory to a more extended review, which the writer, Professor Michælis of Tübingen, has it in contemplation to publish, on the appearance of the second volume.

- 6.—*Commentaries on Equity Pleadings and the incidents thereto, according to the practice of the Courts of Equity of England and America.* By JOSEPH STORY, LL. D., Dane professor of law in Harvard University. Boston: Charles C. Little and James Brown, 1838.

We do not propose to give an extended notice of this admirable work of Mr. Justice Story, as we hope to offer to our readers in our next number the conclusion of the article on his Commentaries on Equity Jurisprudence, the beginning of which appeared in our Journal for July, 1836, in which the present work will be duly noticed. In the mean time, we content ourselves with announcing its appearance, and remarking that in point of learning and research, it will bear a comparison with any of the elaborate works already published by its author, and that, as a practical manual for consultation and reference, it renders all other works of the kind superfluous and unnecessary, as it contains all that is to be found in them, and much that is new.

- 7.—*Revue Etrangère et Française de Législation et Economie Politique, par une Réunion de Jurisconsultes et des Publicistes Français et étrangers*; publiée par M. FÉLIX, Avocat à la Cour Royale de Paris. 5e Année. Deuxième Série. Tome Première, No. 1. November, 1837.

With the fifth year, Mr. Félix commences a new series of his able and interesting journal. The first number contains the following articles: 1. On the provincial laws of the empire of Russia, by Mr. This, master of requests at St. Petersburg; 2. An extract from Mr. Bravard's Manual of Commercial Law; 3. On suicide and its causes, by Mr. Faustin Hellie; 4. An extract from Mr. Leferriere's History of French Law,—on the right of testamentary disposition of property; 5. Patents and Copyrights in the empire of Austria; 6. A review by Mr. O. Gast, of Mr. Gaviel's treatise on the law and practice relating to water courses; and, lastly, the usual list of new publications and critical notices. "The principal objects of the *Revue Etrangère* are,—to diffuse in France a knowledge of foreign institutions and legal systems, and

in foreign countries, a knowledge of the laws and institutions of France:—to ascertain, by comparisons, the deficiencies of both, and to indicate the improvements, of which they are susceptible:—and to give a faithful account of the progress of political economy, in France and foreign countries.”

8.—*The Revised Statutes of the State of North Carolina, passed by the General Assembly at the session of 1836–7*: Printed and published under the supervision and direction of JAMES IREDELL and WILLIAM H. BATTLE. In two volumes. Raleigh: Published by Turner & Hughes, 1837.

The first volume of the Revised Statutes of North Carolina contains the Mecklenburg declaration of independence, adopted on the 20th of May, 1775, with a short history thereof,—the names of the delegates to the state congress in 1776,—the bill of rights and state constitution, with the amendments,—an act concerning the revised statutes,—and one hundred and twenty-three acts, denominated the revised statutes, arranged alphabetically according to their several subjects. The second volume contains a number of statutes, relating to bank charters, the boundaries of the state and its counties, cessions to the United States, Cherokee lands, manufactures, navigation, railroad and turnpike companies, the seat of government, the university of North Carolina,—and several documents of a public character, among which are the first charter of Charles I.,—the fundamental constitutions of North Carolina, drawn up by John Locke, Magna Charta, the articles of confederation of the United States, a short notice of the early history of North Carolina, with a list of the governors thereof, and a sketch of its judicial history, with a list of judges and attorneys general, since the adoption of the state constitution.

The ninth section of the act concerning the revised statutes required the editors to arrange and publish them “in alphabetical order, according to their heads or titles, with marginal references, as reported by the commissioners of revisal, and also with references to the decisions of the supreme court upon their subject matter, and with a full index.” These requisitions seem to have

been complied with by Messrs. Iredell and Battle, in the most faithful and thorough manner.

We find one provision in these statutes, which we certainly did not expect to meet with in a revision of statute law, at the present day, and in this country. We allude to the cumbrous, antiquated, and unmeaning proceeding, denominated benefit of clergy, which is retained in the North Carolina criminal code. We observe, also, no less than twelve classes of offences which are punishable with death, besides many others which become so for the second offence. Several kinds of punishment which are commonly accounted barbarous, and have been accordingly abolished in many states, are reenacted in this code,—such as standing in the pillory, branding on the hand, cropping the ears, and whipping. The last, under the form of “thirty-nine lashes on the bare back,” occurs quite often.

We regard a revision of the statute laws, as one of the most useful and commendable undertakings, in which the people of any state can engage. A great good is obtained, even if nothing more is done, than to bring all the statutes together into one body, without any material change or improvement in their provisions. The first step is thus taken towards the formation of a written code of laws, in which the whole body of common and statute law shall be amalgamated into one homogeneous mass; and, in the mean time, the way is opened for future amendment, by placing the scattered provisions relating to the same subject under one point of view, and subjecting them to the examination and scrutiny of those who are most interested in their improvement.

The Revised Statutes of North Carolina, notwithstanding the blemishes we have taken the liberty to point out, are highly creditable to the state, and to the gentlemen to whom the work of preparing them was confided. We hope to see the example followed in other states, besides those in which revisions are now in progress. This revision was executed by Messrs. Frederick Nash, James Iredell, and William H. Battle, commissioners appointed for the purpose, in pursuance of an act of the general assembly of 1833-4.

- 9.—*Archiv des Criminalrechts*, [Archives of Criminal Law] Neue Folge. Herausgegeben von Professoren ABEGG, in Breslau, HEFFTER, in Berlin, BIRNBAUM, in Utrecht, MITTERMAIER, in Heidelberg, und WÄCHTER, in Tübingen. Jahrgang, 1837.

The first two numbers of this valuable magazine, for the year 1837, contain several very interesting articles, of which the following is a summary : On the progress of legislation in reference to criminal process by Mittermaier ;—On the not hindering of imminent, and the omission to give information of committed, crimes, according to the new project of a criminal code for the kingdom of Würtemberg, of the year 1835, in comparison with the common law, and recent legislation, with particular respect to high treason, By Dr. Hepp of Tübingen ;—On the reception of the Carolina in the individual German States, by Wächter ;—An explanation of the provisions of art. 148 of the Carolina, &c., by Mr. Kauffman, of Tübingen ;—The prerequisites of house searching, by Mr. von Jagemann, of Heidelberg ;—Remarks of a French jurist, (Mr. Hello, of Rennes,) on the punishment of death, together with some introductory remarks by Dr. H. A. Zachariä, of Göttingen ;—The proceedings of the legislative assembly of Hesse, in the session of 1835–1836, on the proposition to limit the publicity of criminal proceedings, in reference to the public ;—A contribution to the history and discussion of the principle of publicity in the administration of justice, by Mr. Bopp, (advocate) of Darmstadt ;—A contribution to the discussion of the question, whether criminal codes ought to contain any general provisions in reference to malicious intention, (*dolus*), by Birnbaum ;—Remarks on Gobler's translation of the Carolina ;—and critical notices of late works on criminal law, by Mittermaier.

- 10.—*A Digest or Abridgment of the Law of Real Property*. By FRANCIS HILLIARD, Counsellor at Law. Vol. I. Boston : Charles C. Little and James Brown. 1838.

Mr. Cruise's Digest of the Laws of England respecting Real Property, has been very extensively used and very highly

esteemed in the United States. The plan of it, which was first suggested to the author by the perusal of Mr. Fearn's work on Contingent Remainders, was well calculated to render the work useful and popular. It proposed nothing less than the reduction of the whole law of real property to a distinct and comprehensive system, under which the general principles should be arranged in a philosophical order, and supported and illustrated by abridgments of the cases, in which they had been established or confirmed. This plan, which required much and diligent study, as well as great caution and judgment, was executed by Mr. Cruise in an unequal but on the whole in a very satisfactory manner; and, his work, embracing as it does the elementary as well as the practical part of the subject, soon supplanted the First Institute, in a great degree, both as a manual for daily use in practice, and as a text book for the student.

Several editions (we believe no less than four) of this valuable digest have been published in the United States, to three at least of which, notes of American cases have been added. But, whilst we have been gradually departing, in our legislative enactments, from the principles on which the English law of real property is founded, we have at the same time been laying the foundations, in the decisions of our numerous state and federal courts, of a distinct and independent system of American real law. The law of real property in the United States, though, in common with that of England, it is still distinguished in many important particulars, from the law of personalty, is yet essentially different from the same branch of the latter system. The principal points of this difference are noticed by Mr. Hilliard in the first chapter of his work, and do not require to be here enumerated; in some of the states, the departure from the common type has been greater than in others; but, in all, it has been sufficient, we imagine, to perplex and embarrass the practising lawyer, and to task the highest powers of the judge. A compendium of our law of real property has therefore become very much needed; and the materials, from which to form it, are no less abundant, in the statute laws of the several states, and in the numerous volumes of American Reports.

The work of compiling a digest of the American law of real property, from the immense mass of English and American authorities, in which it is enveloped, has been undertaken by Mr. Hilliard, of whose recently published digest of Pickering's Reports, we took occasion to express a favorable opinion, in the last January number of our journal; and the first fruits of this new and arduous undertaking are before us in the present volume. The plan adopted by Mr. Hilliard is similar to that adopted by Mr. Cruise, with such modifications, however, as are made necessary by reason of differences in the subject matter. The first volume, which has just been published, (the whole work will be comprised in two), terminates with the subject of tenancy in common.

We have already adverted to the very great want of a work, such as Mr. Hilliard's purports to be; the plan he has adopted seems to us to be the best, which could have been selected to supply the deficiency; and, we are happy to add, that, so far as our examination of this first volume has extended, his labors will well compare with those of his popular and successful predecessor. We commend the work to the favor and patronage of the profession.

11.—*Index Scholarum Gymnasio Hamburgensium Academico a Paschate 1837 usque ad Pascha 1838 Habendarum.* Editus a C. F. WURM, Historiar. P. P. H. A. Gymn. Rectore. Proluditur de jure legibus solvendi s. dispensandi. Hamburgi, 1837.

The above title reminds us of a lady's letter, the cream of which is the postscript, for the pamphlet is principally occupied with a discussion of the subject contained in the words, "Proluditur de jure legibus solvendi s. dispensandi." The writer throws the discussion into the form of a dialogue between himself and two young Englishmen, one a graduate of Cambridge and a reformer and whig, and the other a graduate of Oxford and a conservative and tory. The object of the whole dialogue is to institute a comparison between the dispensing power over the laws as exercised by the Roman emperors on the one hand and the kings of England on the other, and to prove that the charges of slavishness brought

against the Roman law by the common lawyers, were not based upon accurate knowledge of its principles. It is written in good, though not very classical latin, and shews that the writer has investigated his subject with a truly German diligence. In his defence of the civil law, the author cites the opinions of two distinguished jurists of our own country in a paragraph which we copy in the original latin, as a fair specimen of the style, and as enabling our readers to see how an American name looks in a latin dress.

“Pace vero, inquam, tanti viri nobis quoque perfugiendum erit ad testimonia virorum libertatis bonarumque artium studio, et summa juris peritia insignium. Neque ullum eorum proferam, qui in Germania nostra Coryphaei juris habentur, (quorum nonnullos apud vos quoque inclaruissse video) ne eos potissimum excitare videar et in aciem deducere, quibus pro aris et focus sit depugnandum. HENRICUM vero WHEATONIUM, Americanum, honoris causa nomino, virum in Jure Publico summum, quique in jure gentium definiendo et excolendo ita versatus est, ut unus fere omnium MACKINTOSHII et KLUEBERI desiderium, aemulando quod in utroque erat praestantissimum, lenire nobis videatur. WHEATONIUS in oratione quam paucis abhinc annis edidit, aperte testatus est, Blackstonii sententiam ab accuratiore rei cognitione et a recta ratione abhorrrere, neque pronius esse ingenium juris Romani ad fovendam dominationem aut conciliandum servile obsequium, quam indolem ullius legis, quae unquam apud populum aliquem humanitate excultem obtinuerit. Adde quae STORYUS, et ipse Americanus, cujus viget apud vestros juris consultos summa auctoritas, in laudem juris civilis non usitata nec tenui commendatione pronuntiavit.”

12.—*A Digest of the Revised Code and Acts passed by the Legislature between the 7th day of April, 1830, and the 16th day of June, 1836, forming with Purdon's Digest of 1830, a complete Digest of the Laws of Pennsylvania to the present time.* Two volumes in one. By BENJAMIN PARKE and OVID F. JOHNSON, Counsellors at Law, Harrisburg. Philadelphia: 1837.

The statute laws of the state of Pennsylvania, since the publication of Mr. Purdon's valuable digest in 1830, have undergone, in point of form, at least, very great changes. In March, 1830, the governor was authorized and required to appoint three com-

missioners to revise the public acts and statutes, to consolidate those which would admit of consolidation, and to report whether any changes in the forms and modes of proceeding, in the administration of the laws, were necessary, to render the statute laws more simple, plain and perfect. In pursuance of this authority, three gentlemen of high standing at the bar were appointed commissioners, who, from time to time, reported various bills to the legislature, several of the most important of which have been enacted into laws. The labors of these commissioners do not appear to have been directed to a revision of the entire body of the statute laws, and their reduction to a systematic code; but to have been confined, thus far, to certain particular heads, which most needed revision, and which were at the same time of more immediate and practical importance. The acts reported by them and enacted by the legislature, prior to March, 1836, are contained in the first volume of Messrs. Parke and Johnson's Digest. Those reported and enacted since that time, thirteen in number, are inserted in the second volume. This digest contains also the laws enacted in the ordinary course of legislation, between April 7, 1830, and June 16, 1836; and, thus, with the digest of Mr. Purdon, presents the whole statute law of Pennsylvania, down to the last named period.

Besides the laws, the compilers have inserted in their digest, 1. Explanatory notes; 2. Numerous references to the latest decisions of the courts; 3. The explanatory remarks of the commissioners appointed to revise the statutes, accompanying the several bills to which they respectively relate; and 4. A copious general table of contents and a general index, embracing also Purdon's Digest, which is referred to as the *first*, and that of Messrs. Parke & Johnson, as the *second* and *third* volumes. The compilers observe, that the whole work has been so designed and arranged, as to render the reference to Purdon's digest and their own two volumes, "as easy and convenient, as if their contents were embraced in a single volume." The work seems to us to be executed in a faithful manner, and, on a plan, which, considering the state of the statute laws of Pennsylvania, is as well adapted as any to the end

in view. The notes and explanations add much to the value of the work. That on "Canals and Inland Navigation," which exhibits "a brief but accurate historical view," of the various canals and railroads in the state, and an abstract of the principal rules and regulations prescribed for their use by the board of canal commissioners, is interesting to the public in general, as well as to those who have occasion to consult the statute book professionally.

13.—*An act for the Relief of Insolvent Debtors, and for the more equal distribution of their effects; passed by the Legislature of Massachusetts, April 23, 1838. With an Outline of the System thereby introduced and Forms of Proceeding under the same.* By L. S. CUSHING. Boston: Little & Brown, 1838.

This little book contains:

1. A general outline or exposition of the insolvent system, created by the recent statute of the legislature of Massachusetts. This exposition is republished in our present number, in the article on the same subject.

2. The insolvent act, with marginal notes. This statute differs very little, and in none of its essential features, from the bill reported by the commissioners appointed for the purpose in 1831. The sections from one to twenty-one inclusive are substantially the same. The twenty-second section of the original bill, which is stricken out of the present law, abolished imprisonment in civil actions for the recovery of demands under fifty dollars. The twenty-second and remaining sections of the present law are new.

3. The forms of proceedings annexed by the commissioners to their report. These are republished without any essential alteration.

14.—*Private and Special Statutes of the Commonwealth of Massachusetts, from May, 1822, to April, 1837.* Volumes VI. and VII. Revised and published by authority of the legislature, in conformity to a Resolve, passed April 16, 1836. With an Appendix, containing some acts passed previous to October 25, 1780. Boston: Dutton & Wentworth, 1837.

The private and special laws of Massachusetts, from the commencement of the present form of government, in 1780, to May,

1805, were published in three volumes by Messrs. Peleg Coffin and John Davis, commissioners appointed for the purpose. Those which were passed between the last-mentioned period and February, 1822, were published in two volumes by Messrs. Asahel Stearns and Lemuel Shaw, who were at the same time commissioners for the publication of the general laws. The two volumes, recently published, include all the private and special laws, passed between May, 1822, and April, 1837, both inclusive. These last volumes have been edited by Samuel B. Walcott, Esq., in a very careful and correct manner.

15.—*The Statutes at large of South Carolina; edited under authority of the Legislature.* By THOMAS COOPER, M. D. and L.L. D. Volume II., containing the acts from 1682 to 1716, inclusive, arranged chronologically. Columbia, S. C., 1837.

The important work of publishing the statutes at large of the state of South Carolina seems to be advancing with all due expedition, under the auspices of the learned and indefatigable editor, Dr. Cooper. The first volume of this collection, which we noticed in our last number, contained the acts and documents of a constitutional character. The second commences with the statutes properly so called. The first statute published by Dr. Cooper bears the date of 1685. Those which were enacted between 1682 and 1685 are not now to be found; and many of the succeeding acts, for a considerable period, the editor remarks, "are so obscure, from age, from dampness, or in other respects so mutilated, as not to be every where legible." This volume brings down the statutes to the year 1716 inclusive. Dr. Cooper's "notes, containing references to acts of assembly and cases decided in the courts of South Carolina," which form an appendix to the volume, add much to its interest and value. The learned editor is the sworn enemy of "judicial legislation," and the stanch advocate of revision and codification, and loses no opportunity to make known his opinions. The statute law, he thinks, might be digested into plain and intelligible propositions, by two persons in two years; the chancery law would require equal care and labor;

the common law, in its broad acceptation, as much more ; and the criminal law might occupy one person for one year. No better foundation could be laid for a codification of the law, than the publication of the statutes at large.

- 16.—*Reports of cases argued and determined in the Superior Court of Judicature of New Hampshire.* Vol. VII, Nos. II and III. Concord : Marsh, Capen & Lyon, 1838.

The first part of this volume was published in 1836, and was noticed in our thirty-first number. We are informed in a note, that "circumstances, not necessary to be detailed, have delayed the completion of the publication to the present time." The present volume brings the cases down to July, 1835. The present numbers are well printed, and the learning and ability displayed in the questions examined are highly creditable to the bar and bench of New Hampshire. The marginal notes and index are prepared with neatness and precision.

- 17.—*View of the Land Laws of Pennsylvania. With Notices of its Early History and Legislation.* By THOMAS SERGEANT, Esq. Philadelphia : James Kay, Jr., &c., 1838.

This book contains a great deal of useful and valuable information, interesting alike to the student of history, to the legal antiquary, and to the professional lawyer. The author remarks, in his preface, that the land laws of Pennsylvania, notwithstanding they form the basis of titles to real estate, "and are continually subjects of litigation in courts of justice, have been suffered to remain rather an anomalous mass, by no means inviting in its character, or easy to acquire a knowledge of." The purpose of the work before us is to bring this mass into such a state of order, as to facilitate the labors of the professional inquirer, and to open a source of knowledge to those, who, as public officers, legislators, or otherwise, are called on to act in relation to the subject, or who feel an interest in learning something of its principal features.

INTELLIGENCE AND MISCELLANY.

The Hawaiian Spectator. This is the title of a new periodical, the first number of which, published in January last, at Honolulu (Sandwich Islands), has been transmitted to us by the editors, with a request to be furnished with our journal in return ;—a request with which we readily and gladly comply. The following extracts from the first article, entitled “Introductory Observations,” will convey an idea of the proposed character of the work.

“The Hawaiian Spectator will occupy an interesting position in the field of periodical literature. The range of its observation will embrace the whole extent of coast that borders the Pacific on the north and east, and the almost numberless groups of islands that are scattered through this vast ocean,—a geographical extent nearly equal to one half the globe. Within these limits may be found every variety of climate and soil, the various sources of natural wealth, and all the elements of intellectual and moral greatness that are to be found in the other hemisphere.”

“With a local situation that affords facilities for concentrating intelligence, probably superior to any other spot in the Pacific, the purpose of our journal will be, to gather from all the sources of information that may be opened upon us, and to combine correct intelligence upon topics connected with the topographical, political and moral geography of the islands of this ocean and its surrounding continents,—to afford a channel through which the facts that may be evolved in the various departments of natural history and science may be communicated to the world,—to furnish philological information relative to the genius and structure of the various dialects of the Polynesian language, and notices of native literature that may be originated in these dialects, in the progress of the means of education already in use or to be insti-

tuted,—to show the extent, facilities and modes through which commercial enterprises may be conducted, and the means that may be put in operation to pour through the various channels of commerce a salutary moral influence, and the results realized from such measures,—to notice the forms of government that may be organized by the various islanders, and the relations and terms of intercourse instituted between them and foreign powers, and the tendencies of such intercourse upon the destinies of the weaker parties.”

This enumeration of topics embraces some, which come within the limited range of the Jurist; and on which we hope to be occasionally enlightened by our Polynesian brethren. We have been greatly interested by the perusal of this number of their work; and we sincerely hope, that its high moral tone,—its interesting position in literature,—and the evident talent of its contributors,—will give it the wide circulation and extensive patronage, to which it is so well entitled.

Medico-Legal Prescription. Lord chancellor Thurlow held lord Alvanley in great contempt, and when the latter was master of the rolls, took every opportunity to express his feeling. The following instance is mentioned in a life of lord Alvanley, published in the February number of the Law Magazine. When a messenger once went to the chancellor with his Honor’s respects, and regrets that he was too ill to sit at the rolls, the superior judge demanded in a voice of thunder, “What ails him?” “Please your lordship, he is laid up with the English cholera.” “Let him take an act of parliament,”—retorted the ungracious chancellor, with one of those amiable wishes for his organs of vision, in which he was in the habit of indulging,—“Let him swallow that, there is nothing so binding!”

Appointment. The Hon. Charles Jackson, chairman of the commissioners, appointed to codify the criminal law of Massachusetts, having resigned his place on the commission, the board has been reorganized, and the Hon. James C. Alvord, of Greenfield, has been appointed a commissioner.

QUARTERLY LIST OF NEW PUBLICATIONS.

GERMANY.

Bauer, Dr. Ant., Anleitung zur Criminalpraxis.

[Introduction to criminal procedure.]

Centralblatt für Preussische Juristen, redigirt von **C. F. Rauer**, Berlin.

[Central journal for Prussian jurists.]

Claus, Dr. J. G. Forschungen, Erfahrungen, und Rechtsfalle, für Philosophie des Rechts und der Rechtspflege.

[Researches, publications and decisions, relating to the philosophy of law and the administration of justice.]

Criminalrecht, allgemeines, für die Preuss. Staaten, etc. 1r und 2r Bd.

[General Criminal law for the Prussian states.]

Entscheidungen des k. Geh. Ober-Tribunals, herausg. im amtl. Auftrage von **Dr. A. H. Simon** und **H. L. Von Strampff**. 1. Bd.

[Decisions of the royal supreme court of Prussia.]

Ergänzungen des allgemeinen Landrechts für die Preuss. Staaten, herausg. von **F. H. V. Strombeck**.

[Supplements to the general land law of the Prussian states.]

Hagemann, Dr. Th., practische Erörterungen aus allen Theilen der Rechtsgelehrsamkeit, etc.

[Practical discussions in all departments of juridical science.]

Hartt, Dr. F., das römisch-deutsche Recht der Compensation, etc.

[Compensation according to the Roman and German law.]

Haubold, Dr. Chr. G., Anleitung zur Behandlung geringfügiger Rechtssachen, nach sächsischen Rechte. 2e Aufl. von **Ph. H. F. Hänsel**.

[Introduction to summary procedure according to the Saxon law.]

Jahrbücher, critische, für deutsche Rechtswissenschaft. Jahrgang, 1837.

[Critical annals of German jurisprudence.]

Kock, C. F., die Lehre von dem Uebergange der Forderungsrechte durch Universal-und Singular-Succession.

[The theory of the transmission of credits by universal and particular succession.]

Landrecht, allgemeines, für die preuss. Staaten, in Verbindung mit den ergänzenden Verordnungen, herausg. von **A. J. Mannkopff**.

[The general land law (code) for the Prussian states, together with the supplementary ordinances.]

Magazin civilistische, von **Hugo**, 6r Bd. 4s Heft.

Möhl, Dr. Arn., über den Zweck der Strafe.

[On the purpose of punishment.]

Mühlenbruch, Dr. C. F., Lehrbuch des Pandectenrechts, nach der *doctrina pandectarum* deutsch bearbeitet.

[A compendium of the law of the Pandects in German.]

Preuschen, Dr. Fr. Freih. v. Beiträge zur Lehre von dem strafbaren Betrug und der Fälschung.

[On the theory of punishable fraud and falsification.]

Sammlung auserlesene Dissertationen aus dem Gebiete des gemeinen Civilrechtes und Civilprozesses. Herausgeg. von **M. A. Barth**. 2r Bd. 3 Lfg.

[A collection of select dissertations on matters of civil law and procedure.]

Schenck, C. W., die Lehre von dem Retentionsrechte nach gemeinen Rechten.

[Theory of the right of retention according to the common law.]

Wiedenfeld, Dr. K. W., über die Ehescheidung unter den Evangelischen. Ein Beitrag zur Reformation des protest. Eherechts.

[On divorce in the Evangelical church. A contribution towards a reform of the protestant law of marriage.]

Zachariä, Dr. H. A., Grundlinien des gemeinen deutschen Criminal-Processes, mit erläut. Ausführungen und mit besonderer Rücksicht auf die neuern deutschen Legislationen.

[The basis of the common German criminal process, etc.]

Stahl, Fr. J., die Philosophie des Rechts, nach geschichtlich. Ansicht. 2r Bd.

[The philosophy of right deduced historically.]

Bissing, Dr. F., das Verfassungsrecht der Verein. Staaten Nord-Amerikas nach James Kent, nebst der Verfassungs-urkunde und einer statist. Tabelle.

[The constitutional law of the United States of North America, according to James Kent, together with the constitution and a statistical table.]

Ueber den Einfluss der Vertheilung des Grundeigenthums auf das Volks und Staats Leben, von *Schurtz*.

[On the influence of a division of landed property on national and political life.]

Die Lehre von der Mora dargestellt nach Grundsätzen des Römischen Rechts von *D. Carl Otto von Madai*.

[The theory of delay according to the Roman law.]

Weber, Dr. G., der Calvinismus im Verhältnisse zum Staate. Aus dem Standpunkte der Geschichte dargestellt.

[Calvinism in its political relations.]

Das Recht des Besitzes, von *Dr. F. C. von Savigny*.

[This is the 6th edition of the work on possession, of which we have published an analysis in this and our last number.]

FRANCE.

Le Droit civil, expliqué suivant l'ordre des articles du code : *De la Vente*. Par *M. Troplong*, 3d ed., 2 vol. 8vo. Paris, Hingray.

Exposé sommaire de la constitution des Etats-Unis d'Amerique, par *M. Duponceau* ; traduite d l'Anglais, par *M. d'Homergue*, avec des notes du traducteur.

Manuel du droit Français ; par *M. Paillet*. 9e ed., 2 volumes. Paris, Lenormant.

Commentaire sur le code civil ; par *J. M. Boileux*, relu et annoté par *M. Poncelet*, tome 3 et dernier. Paris, Joubert.

Commentaire sur la loi des actes de l'etat civil ; par *M. C. Rieff*, avocat-general, à Nimes. Paris Videcoq.

Traité des Servitudes réelles ; par *M. V. H. Solon*. Paris, Videcoq.

Collection des lois maritimes au 18me siecle ; par *M. Pardessus*. Tome 6. Paris, Treuttel et Wurtz.

Essai sur la centralization administrative ; par *M. Bechard*. Marseilles, Marius-Olive ; Paris, Hivert.

Cours de droit Français, suivant le code civil ; par *M. Duranton*. Tome 21 et dernier. Paris, Gobelet.

Résumé de la philosophie du droit, d'après le point de vue historique de Frederic-Jules Stahl, par *M. Henri Klimrath*. Paris, Levrault.

Traité theorique des contrefaçons en tous genres, ou de la propriété en matière de litterature, théâtre etc ; par *M. Adrien Gastambide*. Paris, Legrand.

Le droit civil Français, suivant l'ordre du code ; par *Toullier*, tome 19 ; continuation (article 1832 et suivant) ; par *M. J. B. Duvergier*, tome 4. Paris, Renouard.

Guide diplomatique ; par le baron *Charles de Martens*. Nouvelle édition, revue, augmentée des notes etc ; par *M. de Hoffmans*. 3 volumes. Paris, Aillaud.

De la lettre de change et du billet à ordre ; par *M. Eugène Persil*. Paris, Joubert.

Nouveau manuel des vices redhibitoires des animaux domestiques ; par *M. Lavenas*. Paris, Renard.

Guide aux droits civils et commerciaux des étrangers en Espagne, etc. ; par *M. Guillaume Lobé*. 2e ed. Paris, Guilbert.

Traité de la contrefaçon et de sa poursuite en justice, concernant les brevets d'invention, etc. ; par *Etienne Blanc*. Paris, chez l'auteur.

D'une nouvelle législation sur les sociétés de commerce ; par *M. Horson*. Paris, Dupont.

Histoire du droit Français ; par *M. Laferriere*. Tome 2. Paris, Joubert.

Institutes de l'empereur Justinian, traduites en Français avec le texte en regard, etc. ; par *M. Blondeau*. 2 volumes. Paris, Videcoq ; Joubert.

Encyclopedie des lois, etc. depuis 1788 ; par *M. Jules Forfelier*. T. I., premiere livraison. Paris, F. Didot.

Études du droit public ; par *M. Schutzemberger*. Paris et Strasbourg, Levrault.

Manuel de Philosophie ; par *M. Auguste-Henri Matthiä* : traduit de l'allemand, par *M. Poret*. Paris, Joubert.

Traduction du livre VII. des Pandectes, accompagnée d'un commentaire, etc. ; par *M. C. A. Pellat*. Paris, Gobelet.

Observations sur les faillites et banqueroutes, etc. ; par *M. P. E. Laviron*. 2e ed. Paris, chez l'auteur.

Collection complete, par ordre chronologique, des lois, etc. ; par *M. Walker*. Tome 5e et dernier. Paris, Masssard et Jousset.

Mémoires sur les differens rapports sous lesquels l'age était considéré dans la législation romaine ; par *M. Pardessus*. Extrait des Mémoires de l'académie des inscriptions et belles-lettres, tome xiii.

Manuel des inventeurs et des brevetés ; par *M. Perpigna*. Seconde édition, revue, corrigée et augmentée de la législation étrangère.

[Republished in the Law Library, vol iv.]

Tractatus de contractibus, hodiernis galliarum legibus accom-
modatus; auctore D. Lyonnet. Lyon; Pelagaud.

Tractatus de justitia et jure, hodiernis galliarum legibus accom-
modatus; auctore D. Lyonnet. Lyon; Pelagaud.

De la garantie et des vices redhibitoires dans le commerce des
animaux domestiques; par M. Huzard, fils. 4e ed. Paris,
Madame Huzard.

ENGLAND.

The Judgments delivered by the Lord Chief Justice Holt, in the
case of *Ashby v. White* and others, and in the case of *John Paty*
and others. Royal 8vo.

The Criminal Law, as altered by various statutes of William IV
and 1 Vict. alphabetically arranged. By *Richard Matthews*,
12mo.

The Attorney's new Pocket-book, Notary's Manual and Con-
veyancer's Assistant. By *R. Shipman*, 12mo.

Commentaries on Colonial and Foreign Laws generally, and on
their conflict with each other, and with the Laws of England. By
William Burge. 4 volumes, royal 8vo.

[Very highly commended in the *Law Magazine* for February, 1837.]

Outlines of Criminal Law: or Readings from Blackstone and
other text writers; altered according to the present law, and in-
cluding all the recent statutes, comprising public wrongs. By
Robert Maugham. 12mo.

[Executed, like all Mr. Maugham's publications, with learning and sound
judgment. *Law Magazine*.]

The new Criminal Acts of Will. 4 and 1 Vict. cc. 84 to 90.
By *H. W. Woolrych*. 12mo.

In addition to the above, new editions of the following works
have recently appeared, namely:

Williams's Law of Executors, &c., 2d ed.; *Toller's Law of*
Executors, &c., 7th ed.; *Stephen*, on Pleading, 4th ed.; *Arch-*
bold's Practice in Personal actions, &c., by *Chitty*; *Selwyn's*
Nisi Prius, 9th ed.; *Maddock's Chancery*, 3d ed.; *Ram on As-*
sets, &c., 2d ed.; *Burton's Compendium of Real Property*, 4th
ed.; *Grant's Chancery Practice*, 4th ed.

UNITED STATES.

The Law Library, edited by *Thomas J. Wharton*, Esq., and
published by John S. Littell. Philadelphia: Nos. 58, 59, 60,
containing:

An Essay on Marketable or Doubtful Titles to Real Estate. By *S. Atkinson*, Esq.; and Principles of Conveyancing; with an Introduction on the Study of that branch of law. By *Charles Watkins*, Esq., with the author's last corrections and with very considerable additions by *Richard Preston*, Esq.

A Digest or Abridgment of the Law of Real Property. By *Francis Hilliard*, Counsellor at Law. Vol. I. Boston: Charles C. Little and James Brown.

Reports of Cases argued and determined in the Court of Appeals of Maryland. By *Richard W. Gill* and *John Johnson*. Vol. VII. Baltimore: W. & J. Neale, 1838.

A Digest of the cases decided and reported in the courts of New York, from 1823, to October 1836: being a supplement to Johnson's Digest. Philadelphia: E. Backus, 1838.

Reports of Cases argued and determined in the Superior Court of Judicature of New Hampshire. Vol VII. Concord: Marsh, Capen & Lyon, 1838.

Speech of James Madison Porter, of Northampton, in the Convention of Pennsylvania, on the subject of the right to annul charters of incorporation. Delivered November 20th, 1837. Philadelphia: Hay & Co., 1837.

The Practice in Civil Actions and Proceedings in the Supreme Court of Pennsylvania, and in the District Court and Court of Common Pleas for the City and County of Philadelphia; and also in the courts of the United States. By *Francis J. Troubat* and *William W. Haly*. In two volumes. Philadelphia: R. H. Small, 1837.

View of the Land Laws of Pennsylvania. With notices of its early History and Legislation. By *Thomas Sergeant*, Esquire, Philadelphia: James Kay, Jr., &c., 1838.

A Digest of the Revised Code and Acts passed by the Legislature, between the 7th day of April, 1830, and the 16th day of June, 1836, forming, with Purdon's Digest of 1830, a complete Digest of the Laws of Pennsylvania, to the present time. By *Benjamin Parke* and *Ovid F. Johnson*, Counsellors at Law, Harrisburg. Philadelphia, 1837.

The Statutes at large of South Carolina: edited, under authority of the Legislature, by *Thomas Cooper*, M. D., LL. D. Volume second, containing the acts from 1682 to 1716 inclusive, arranged chronologically. Columbia, S. C.: 1837.

Private and Special Statutes of the Commonwealth of Massachusetts, from May, 1822, to April, 1837. Volumes VI. and VII. Boston: Dutton & Wentworth, 1837.

An act for the Relief of Insolvent Debtors and for the more equal distribution of their effects, passed by the Legislature of Massachusetts, April 23d, 1838. With an outline of the system thereby introduced, and forms of proceeding under the same. By *L. S. Cushing*. Boston: Little & Brown, 1838.

A Popular Essay on subjects of Penal Law, and on uninterrupted solitary confinement at labor, as contradistinguished to solitary confinement at night and joint labor by day, in a letter to John Bacon, Esq., President of the Philadelphia Society for alleviating the miseries of Public Prisons. By *Francis Lieber*, Corresponding member of the society, Professor of History in South Carolina College. Philadelphia: 1838.

Reports of Cases argued and determined in the Supreme Judicial Court of the State of Maine. By *John Shepley*, Counsellor at Law. Vol. I. Hallowell: Glazier, Masters & Smith.

Remarks on Literary Property. By *Philip H. Nicklin*. Philadelphia: Nicklin & Johnson, 1838.

Reports of Cases argued and determined in the Supreme Court of Pennsylvania. By *Frederick Watts*, Counsellor at Law. Vol. VI. May to September, 1837. Philadelphia: Kay, &c., 1838.

The Law Reporter, No. 2. For June, 1838. Boston: Weeks, Jordan & Co. 1838.

Supplement to the Revised Statutes of Massachusetts. Edited by *Theron Metcalf*. No. 3.—1838. Boston: Dutton & Wentworth, 1838.

IN PRESS.

A Digest of the Public Laws of New Jersey. By *Lucius Q. C. Elmer*, Esq.

A Summary of Practice in Courts of Civil and Admiralty Jurisdiction, in instance, revenue, and prize cases. By the *Hon. Samuel R. Betts*, Judge of the District Court for the Southern District of New York.

Reports of Cases in the Superior Court of the City of New York. By *J. Prescott Hall*.

A Digest or Abridgment of the Law of Real Property. By *Francis Hilliard*. Volume II.

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